Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

J. ALEX COTA,

Petitioner,

v.

DAVID SIMONTON, *THE DOCKET*, an unincorporated association, SUSAN WESTERBERG PRAGER and BOARD OF REGENTS OF THE UNIVERSITY OF CALIFORNIA,

Respondents.

On Petition For A Writ Of Certiorari To The California Court Of Appeal, Second Appellate District, Division Two

PETITION FOR A WRIT OF CERTIORARI

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155 pp

QUESTIONS PRESENTED

1. Whether petitioner, a former university student, was improperly deemed by the California Court of Appeals to be a "limited purpose public figure" under this court's ruling in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974) when it determined that Petitioner "instigated the *The Docket* article and attempted to influence public opinion through it," even though respondent Simonton (the editor) admitted that prior to preparing the article, he had "never heard of Plaintiff," and which determination resulted in the striking of petitioner's libel action against such editor and newspaper under California's SLAPP statute, Code of Civil Procedure section 425.16, due to the requirement of actual malice by clear and convincing evidence in a libel action against a newspaper by a public figure.

2. Whether California's SLAPP statute, California Code of Civil Procedure, section 425.16, unduly burdens the petitioner's First Amendment right to petition the government for a redress of grievances by summarily striking a libel claim without the benefit of requested discovery (and by the imposition of attorneys' fees) thereby also effectively violating Petitioner's right to due process.

3. Whether an article about the petitioner which was on its face calculated to subject him to mockery and ridicule and is replete with factual conclusions disguised as opinions, is libelous where the article is read in its entirety and the article's audience and context is taken into consideration.

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PETITION FOR WRIT OF CERTIORARI

J. Alex Cota respectfully petitions for a writ of certiorari to review the decision of the California Court of Appeals for the second appellate district in this case.

OPINIONS BELOW

The opinion of the California Court of Appeals is unpublished. (Pet. App. 1-19). The judgment and oral decision of the trial court is unpublished. (Pet. App. 100-115).

JURISDICTION

The California Court of Appeals entered its decision on December 5, 2000. The Supreme Court of California denied a petition for review on March 14, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3) which states "the Supreme Court has jurisdiction to review cases in state courts by way of certiorari . . . (3) where a title, right, privilege, or immunity is set up or claimed "under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States."

STATUTORY PROVISIONS INVOLVED

United States Constitution, First Amendment

The First Amendment of the United States Constitution provides, in relevant part, that "Congress shall make

no law . . . abridging the freedom of speech, or of the press; or the right of the people . . . to petition the government for a redress of grievances." U.S. Const., Amend. I.

California's Code of Civil Procedure, §425.16

Legislative findings; Special motion to strike action arising from "act in furtherance of person's right of petition or free speech under United States or California Constitution in connection with a public issue."

California Code of Civil Procedure, section 425.16, provides in relevant part

> (a) The Legislature finds and declares that there has been a disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances. The Legislature finds and declares that it is in the public interest to encourage continued participation in matters of public significance, and that this participation should not be chilled through abuse of the judicial process. To this end, this section shall be construed broadly.
>
> (b)(1) A cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States or California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim.

(2) In making its determination, the court shall consider the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based.

(3) If the court determines that the plaintiff has established a probability that he or she will prevail on the claim, neither that determination nor the fact of that determination shall be admissible in evidence at any later stage of the case, and no burden of proof or degree of proof otherwise applicable shall be affected by that determination.

(c) In any action subject to subdivision (b), a prevailing defendant on a special motion to strike shall be entitled to recover his or her attorney's fees and costs . . .

. . .

(e) As used in this section, "act in furtherance of a person's right of petition or free speech under the Unites States or California Constitution in connection with a public issue" includes . . . any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law; or any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest.

. . .

(g) All discovery proceedings in the action shall be stayed upon the filing of a notice of motion made pursuant to this section. The motion shall be noticed for hearing not more than 30 days after service unless the docket

conditions of the court require a later hearing. The stay of discovery shall remain in effect until notice of entry of the order ruling on the motion. The court, on noticed motion and for good cause shown, may order that specified discovery be conducted notwithstanding this subdivision.

California Civil Code, §45

"Libel is a false and unprivileged publication by writing, printing, picture, effigy, or other fixed representation to the eye, which exposes any person to hatred, contempt, ridicule, or obloquy, or which causes him to be shunned or avoided, or which has a tendency to injure him in his occupation."

United States Constitution, Fourteenth Amendment, Due Process Clause

"[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . " U.S. Const. Amend. XIV.

STATEMENT OF THE CASE

Petitioner, J. Alex Cota ("Cota"), sued *The Docket*, a student newspaper of the University of California (Los Angeles) ("UCLA") Law School, and its editor David Simonton ("Simonton"), Susan Westerberg Prager, Dean of UCLA Law School, and the Board of Regents of the University of California, in the Superior Court of Los Angeles, California. Petitioner alleged that the newspaper

libeled him, impairing his efforts to gain re-admission to the UCLA Law School.

Respondent, *The Docket*, motioned the court under California Code of Civil Procedure, section 425.16, to strike Petitioner's libel action. Respondents asserted that the Petitioner was a public figure. (Pet. App. 52-53). In so doing, the Respondents also argued that the article was protected by the United States Constitution, specifically the First Amendment, thereby raising a federal question regarding what is the correct constitutional standard of protection for free press when balanced against a private individual seeking redress for libel. (*See, e.g., Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 111 L. Ed. 2d 1, 110 S. Ct. 2695 (1990)). Petitioner requested discovery at the initial hearing before the superior court, but this request was denied. (Pet. App. 84, 112-114). The superior court granted the Respondents' motion to strike and awarded Respondent's attorneys fees. (Pet. App. 97). Petitioner appealed to the California Court of Appeals for the Second District – Division Two. Again in the briefs to the Court of Appeals the constitutional issue regarding the proper balancing of First Amendment protected free speech and press was raised as well as the contention that Petitioner was a limited purpose public figure. (Pet. App. 119).

The Court of Appeals affirmed the lower court's decision on December 5, 2000. (Pet. App. 1). In its opinion, the Court of Appeals determines that the Petitioner is a limited purpose public figure. The Court of Appeals also stated that any issue regarding the constitutionality of §425.16 had been waived because of the Petitioner's failure to raise the issue previously with proper citation of

authority. However, as more fully set forth hereinbelow, this analysis is inadequate. Among other things, it would not have been possible for the Petitioner to raise the issue regarding the constitutionality of §425.16 and its effect on due process by preventing discovery until after the request for discovery was denied by the superior court and the motion to strike granted. Also, appellate review is presumably *de novo* of a summary proceeding such as the motion to strike (although Petitioner is unable to find dispositive authority with respect thereto).

The Supreme Court of California denied Petitioner's petition for review on March 14, 2001. Petition for Certiorari is proper as the California Superior Court and the Court of Appeals decided the issues based on both state and federal grounds. Both courts refer to federal case law and/or the First Amendment of the United States Constitution, and the plain language of California Civil Code §425.16 references rights of free speech and the right to petition for redress of grievances under the United States Constitution in connection with a public issue.

The California Court of Appeals stated in *Brown v. Kelly Broadcasting Co.*, that "under the *New York Times* standard of fault and related restrictions, a victim of defamation, as a practical matter, seldom recovers damages. A defamation victim faces almost insurmountable obstacles to recovery within the constitutional limitations." *Brown v. Kelly Broadcasting Co.*, 48 Cal. 3d 711 (1989). These "insurmountable obstacles" are found in the opinion of the Court of Appeals in the present case.

In April 1998, *The Docket*, a student newspaper of the UCLA Law School, published an article, "The Strange

Tale of J. Alex Cota," concerning Petitioner's claims that in the early 1950's he had been given undeservedly low grades which precluded him from continuing as a student at the Law School, and that the low grades had been given in retaliation for Cota speaking out against McCarthyism. (Pet. App. 33-43).[1]

After publication of this article, Petitioner filed an action for libel against the newspaper based upon the defamatory content of this article. (Pet. App. 21). In his initial complaint, the Petitioner cited to numerous libelous statements throughout the article and contended that, when read in its entirety, the article belittled, mocked and ridiculed him, thereby impairing his chances of gaining readmission to UCLA Law School. The article at one point attributed statements to Cota that were actually made by the former dean of UCLA Law School, L. Dale Coffman ("Coffman") which Cota had disputed for years and also happened to contradict Coffman's earlier verified statement. (*i.e.*, "Cota rose to his feet and asked Coffman if he was afraid of Joe McCarthy.") In yet another passage, the article states: "So it had all boiled down to that: a massive McCarthyist conspiracy against Mr. Cota. I guess the great thing about conspiracy theories is that they are tautological; once you accept the thesis, any lack of evidence (or the existence of any contrary evidence) only helps prove the conspiracy. But while that type of proof might suffice for an Oliver Stone

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[1] The lengthy factual background of this claim is set forth in Petitioner's first amended complaint (Pet. App. 21-33) and his declaration in support of the opposition to the motion to strike (Pet. App. 85-96).

screenplay, it isn't the stuff of good investigative journalism." In truth and in fact, Petitioner's complaints are substantiated by substantial compelling evidence,[2] and the mocking comments about conspiracy falsely denigrate plaintiff's sanity, judgment, credibility, and the reasonableness of his position.[3] The Article (and a second article that appeared in *The Docket* which states, "it became apparent that his claims were not only fantastic, but also unsubstantiated.") is contained in the Appendix. (Pet. App. 71). It is respectfully requested that the Court review same in the context of Mr. Cota's petition to obtain reinstatement of his previously wrongful discharge and the amount of substantial evidence substantiating his claim of wrongful discharge from the law school. It is clear that the summary application of Civil Code of Procedure §425.16 in the present case deprived Petitioner of his ability to present this evidence.

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[2] Mr. Cota's claims are substantiated by numerous significant facts; among them, the tests were suspiciously destroyed by the professors even though Cota had requested that they be maintained pending a review and the primary responsible professor (*i.e.*, Coffman) contradicted his testimony with respect to material facts – including when he destroyed the exam and whether there was an in-class exchange regarding McCarthyism (which he originally denied).

[3] In Simonton's declaration, he repeatedly states that he "did not intend to disparage or damage Plaintiff, imply that plaintiff was irrational or lacked good sense, denigrate Plaintiff's judgment or reasonableness, hinder Plaintiff's ability to pursue a legal career or legal studies, or defend any previous actions by the Law School faculty or administration." However, this repeated denial more accurately reflects the true impressions made by the article to its audience.

Libel is defined by California Civil Code, §45 as "a false and unprivileged publication by writing . . . which exposes any person to hatred, contempt, ridicule, or obloquy, or which causes him to be shunned or avoided, or which has a tendency to injure him in his occupation." (Cal. Civ. Code, §45.)

"An essential element of libel is a false statement of fact. As a matter of constitutional law, a statement of opinion is not actionable unless a reasonable fact finder could conclude that the published statements imply a provably false factual assertion." (Pet. App. 12 (Citing *Copp v. Paxton*, 45 Cal.App.4th 829, 837 (1996))).

California courts have adopted a totality of the circumstances test to determine whether an alleged defamatory statement is one of fact or of opinion. (*Baker v. Los Angeles Herald Examiner*, 42 Cal. 3d 254, 260 (1986)). "First the language of the statement is examined . . . Next the context in which the statement was made must be considered . . . the facts surrounding the publication must also be carefully considered. This contextual analysis demands that the courts look at the nature and full context of the communication and to the knowledge and understanding of the audience to whom the publication was directed. The publication in question must be considered in its entirety." *Id.* at 260-261.

The lower court determined that the Petitioner had failed to demonstrate a probability of success in his action for libel. In making this determination, the lower court impliedly adopted Respondent's argument that the Petitioner was a limited purpose public figure (Pet. App. 100-115).

Upon review, the Court of Appeals chose to analyze five specific statements which had been specifically set forth in the original complaint. However, the Court of Appeals failed to examine the article in its entirety or consider its audience (*e.g.*, the very institution to which Cota was seeking reinstatement), or otherwise comply with *Baker, supra*. The Court of Appeals determined that three of these statements were nonactionable as opinion and not fact. (Pet. App. 13). Although the Court of Appeals acknowledged that the two remaining statements it chose to specifically analyze were statements of fact, it determined that neither is actionable as libel. (Pet. App. 14).

The Court of Appeals made this determination by relying upon this courts opinions in both *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 351 (1974), and *New York Times v. Sullivan*, 376 U.S. 254, 296 (1964). (Pet. App. 14-15). The court determined that the Petitioner was a public figure as defined in *Gertz* and as such, he "must prove by clear and convincing evidence that an allegedly defamatory statement was made with actual malice, knowledge of its falsity or with reckless disregard of its truth or falsity." *Id.*

Applying the foregoing standard it had ennunciated, the Court of Appeals concluded that "[e]ven assuming, arguendo, that the description of the Coffman incident that appeared in *The Docket* was false, Appellant nevertheless presented insufficient competent evidence to demonstrate a probability of proving that the statement describing his questioning of Coffman was published with actual malice *or* that the statement exposed Appellant to 'hatred, contempt, ridicule, or obloquy' or injury 'in his occupation' within the meaning of Civil Code

section 45." (Pet. App. 18). Since Petitioner is not a public figure, and since the article, when considered in its entirety in light of its audience and context, clearly subjects Petitioner to mockery and ridicule and contains many statements of purported "opinions" which imply false facts, the decision by the Court of Appeals must be reversed.

REASONS FOR GRANTING THE WRIT

I. The Importance Of Supreme Court Review: Any Decision Which Might Define First Amendment Protection To The Press Is Of The Utmost Importance

This court has the ultimate authority to determine the meaning and intent of the United States Constitution. As such, it has on numerous occasions found itself defining the protection of freedom of speech and the press and the right to petition for redress of grievances found within the First Amendment.

Petitioner requests that the Court further guide the lower courts in determining the outer limits of the protection guaranteed to the press in matters of public concern. Specifically, Petitioner requests that this Court give guidance to the lower courts in determining the proper balance between an individuals right to seek redress for defamation and the freedom of press. In making this determination, lower courts have been repeatedly called upon to make an initial determination whether the plaintiff in a libel case brought against the press is a public figure as required by *New York Times v. Sullivan*, 376 U.S.

254 (1964). However, the Supreme Court of California itself stated that "under the *New York Times* standard of fault and related restrictions, a victim of defamation, as a practical matter, seldom recovers damages. A defamation victim faces almost insurmountable obstacles to recovery within the constitutional limitations." (50 Am. Jur. 2d, Libel and Slander, §31 (citing *Brown v. Kelly Broadcasting Co.*, 48 Cal. 3d 711 (1989))).

Although this court attempted to offer the lower courts an adequate test for making a public figure determination in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 41 L. Ed. 2d 789, 94 S. Ct. 2997 (1974), in part by holding that an individual who "voluntarily injects himself or is drawn into a particular public controversy . . . becomes a public figure for a limited range of issues.", *Id.* at 351, it left open to the various federal and state courts the level of involvement required. Even under the rationale in *Gertz*, the Petitioner would not be considered a limited purpose public figure since he played a "minimal role" in the public issue of McCarthyism and "did not thrust himself into the vortex of this public issue." *Id.* at 352. Currently there is a multitude of varying tests for determining the status of limited-purpose public figures within the various Federal circuits. *See*, discussion, *infra*. Additionally, state courts such as California have created their own tests which differ from the federal circuits. (Pet. App. 14-15).

Additionally, the Superior Court denied the Petitioner's request for discovery. (Pet. App. 112-114). Yet, in *Lafayette Morehouse, Inc. v. Chronicle Publishing Co.*, the California Court of Appeals "acknowledge[d] that the discovery stay and 30-day hearing requirement of section

425.16 literally applied in all cases might well adversely implicate a plaintiff's due process rights, particularly in a libel suit against a media defendant." 37 Cal.App.4th 855, 867-868 (1995). The court went on to state that if discovery is sought,

> [t]hat opportunity . . . is of prime import in a libel suit against a media defendant who will generally be the principal, if not the only, source of evidence concerning such matters as whether that defendant knew the statement published was false, or published the statement in reckless disregard of whether the matter was false and defamatory, or acted negligently in failing to learn whether the matter published was false and defamatory . . .

Id. at 868.

Not only does California's Code §425.16, encourage that a motion to strike be decided without the benefit of discovery, it also allows a party who is successful in bringing such a motion to recover attorney's fees. In this case, the lower court did award the Respondent said fees. (Pet. App. 97). This procedure, therefore, has the effect of chilling an individual's right to bring a libel action against the media where any other unsuccessful libel plaintiff does not have to pay his adversary their attorneys' fees. For these reasons, due process issues are presented as well by this case.

The Due Process Clause of the Constitution's Fourteenth Amendment explicitly states "[N]or shall any state deprive any person of life, liberty, or property, without due process of law," *U.S. Const. 14th Amend.* This Court itself stated, "By requiring the government to follow

appropriate procedure when its agents decide to 'deprive any person of life, liberty, or property,' the Due Process Clause promotes fairness in such situations." *Daniels v. Williams*, 474 U.S. 327, 331 (1986). Additionally, this Court held that the right to petition for a redress of grievances is among the most precious of the liberties safeguarded by the Bill of Rights. *Mine Workers v. Illinois Bar Assn.*, 389 U.S. 217, 222 (1967). Furthermore, this Court went on to determine that by allowing the state to prevent a union from hiring attorneys to assist its members in asserting their legal rights, the state would violate the First Amendment as incorporated by the Fourteenth. *Id.* at 225. This Court specifically stated, "We have repeatedly held that laws which actually affect the exercise of these vital rights cannot be sustained merely because they were enacted for the purpose of dealing with some evil within the state's legislative competence, or even because the law do in fact provide helpful means of dealing with such an evil." *Id.* at 222.

Likewise, California Civil Code of Procedure §425.16, as applied to the Petitioner, deprived him of both property and liberty when the courts summarily decided to grant Respondent's motion to strike without granting the discovery request, thereby denying Petitioner his right to redress grievances. By granting the Respondent attorney's fees, Petitioner also was deprived of property. Although the California legislature enacted §425.16 to protect freedom of speech and press, in this case the act is unconstitutionally broad in its application to the Petitioner and effectively chills his attempt to exercise his right to redress grievances.

II. Conflicts Among The Courts: Currently The Federal Circuits And State Courts Use conflicting Tests To Determine Whether An Individual Is A Limited Purpose Public Figure For First Amendment Purposes

"In several circuits the Courts of Appeals have adopted a three-step test for determining whether a plaintiff has the status of a limited-purpose public figure: (1) the controversy at issue must be public both in the sense that people are discussing it and people other than the immediate participants in the controversy are likely to feel the impact of its resolution; (2) the plaintiff must have more than a trivial or tangential role in the controversy; and (3) the alleged defamation must be germane to the plaintiff's participation in the controversy." (50 Am. Jur. 2d, Libel and Slander §75 (citing *Trotter v. Jack Anderson Enters.* (CA5 Tex) 818 F2d 431; *Silvester v. American Broadcasting Cos.* (CA11 Fla) 839 F2d 1491; *Waldbaum v. Fairchild Publications,* 201 US App DC 301, 627 F2d 1287 and *Dameron v. Washington Magazine,* 250 US App DC 346, 779 F2d 736.) (Pet. App. 124).

Under another approach, "a defendant must show that the plaintiff has (1) successfully invited public attention to his views in an effort to influence others prior to the incident that is the subject of litigation; (2) voluntarily injected himself into a public controversy related to the subject of the litigation; (3) assumed a position of prominence in the public controversy; and (4) maintained regular and continuing access to the media." (50 Am. Jur. 2d, Libel and Slander §75 (citing *Lerman v. Flynt Distributing Co.* (CA2 NY) 745 F2d 123, cert den 471 US 1054, later

proceeding 789 F2d 164, cert den 479 US 932 and *Pesta v. CBS, Inc.* (ED Mich) 686 F Supp 166.)

The previous tests are just two of the five varying tests outlined within the 2nd edition of *American Jurisprudence.* (Pet. App. 124-127). The California Court of Appeals in its decision regarding this case, announced a three-part test for determining whether an individual is a public figure for a limited range of issues: (1) The courts must first find that there was a public controversy; (2) The courts examine whether the plaintiff undertook "some *voluntary* act through which he seeks to influence the resolution of the public issues involved." (*Reader's Digest Assn. v. Superior Court,* 37 Cal.3d 244, 254 (1984), original italics.) Courts look for evidence of affirmative actions by which purported "public figures" have thrust themselves into the forefront of particular controversies. (*Id.* at pp. 254-255.); and (3) The alleged defamation must have been germane to the plaintiff's participation in the controversy. (*Copp v. Paxton,* 45 Cal.App.4th 829, 846 (1996).) (Pet. App. 14-15).

Not only is the California test different than each of the five tests utilized by the various districts, the test as announced by the Court of Appeals is in the present case ambiguous. It is unclear whether a single act or more than one act is required.

Until this court determines what level of involvement in a public controversy by a private individual is sufficient to affect that individual's right to redress grievances through a defamation action by labeling him a limited purpose public figure, when balanced against the First Amendment protection of free press, the Petitioner and

others likewise situated will continue to be at the mercy of the varying jurisdictions. This court should heed Justice Stewart's warning in *Rosenblatt v. Baer*, "The preventive effect of liability for defamation serves an important public purpose. For the rights and values of private personality far transcend mere personal interest. Surely if the 1950's taught us anything, they taught us that the poisonous atmosphere of the easy lie can infect and degrade a whole society." 383 U.S. 75, 93-94 (1966). Additionally, it appears that under the current precedent established to date, the protection provided to the press under the First Amendment varies according to which jurisdiction the newspaper finds itself within when defending a libel action.

III. Errors In Court Below

Both the lower court and the Court of Appeals were operating under an incorrect paradigm which required that the Petitioner prove that the newspaper article and its allegedly defamatory statements were written with actual malice, knowledge of falsity or with reckless disregard of its truth or falsity. In addition, the Court of Appeals based this requirement on the constitutionally required protection of the press announced by this court in *New York Times v. Sullivan*, 376 U.S. 254, 296 (1964).

If this court determines that the California Court of Appeals current test for the determination of a limited purpose public figure is constitutionally overbroad by merely requiring in the present case a single act on the

part of the plaintiff to make him a public figure,[4] then the state court's ruling must be reversed. Furthermore, Petitioner would *not* be considered a limited purpose public figure under the federal tests set forth herein above.

The California Court of Appeals in its written opinion states simply that the "Appellant instigated the *The Docket* article and attempted to influence public opinion through it" without any analysis of the level of participation by the Petitioner. (Pet. App. 15). The only reference within the Court of Appeal's opinion as to the measures taken by Petitioner is within the second page of the opinion under the subheading of "Statement of Facts and Procedural History" in which the court states the article was initiated by Petitioner when he telephoned *The Docket's* office in spring 1998 and spoke with Respondent Simonton. The court goes further in acknowledging that "At the close of the conversation, Simonton invited Appellant to a face-to-face interview, and asked if Appellant wanted an article written about him." (Pet. App. 3). Petitioner then acquiesced to this invitation by the Respondent.

The Petitioner acknowledges his ongoing efforts to be re-admitted to the University's law school including a previous article written in *The Docket* in 1980, some 18

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[4] The Court of Appeals based said finding on the mere fact that Petitioner "telephoned *The Docket's* office in spring 1998 and spoke with Respondent Simonton . . . [after which] . . . Appellant sent Simonton documents related to his correspondence with university officials and his prior related lawsuit", even though Simonton had admitted that he had never "heard of" Cota before doing the article.

years prior to the article at issue now. It is conceded by the Respondent, Simonton, that at the time he received the telephone call from Petitioner, he had never heard of J. Alex Cota. Petitioner was therefore not a public figure at that time even within the law school audience to which the paper was directed.

Therefore, the audience to which the article was addressed was not discussing this issue prior to the publication of this article and neither had the Petitioner maintained regular and continuous access to the media. Under each of the previous tests which have been adopted by differing circuits, these two flaws would be fatal to any argument that the Petitioner was a limited purpose public figure. Under California law, Petitioner has been left without a remedy due to its court's incorrect interpretation of the rule of *Gertz v. Robert Welch, Inc.*, 418 U.S. 323.

Lastly, any argument which might be raised to the effect that California's state courts based their decision solely on state libel law and the Petitioner's failure to show that the statements exposed Petitioner to "hatred, contempt, ridicule, or obloquy" or injury "in his occupation" within the meaning of Civil Code §45, also fails due to this courts holding in *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 17 (1990), which held that *Gertz* did not intend "to create a wholesale defamation exemption for anything that might be labeled 'opinion.' " Rather this court stated that

> Even if the speaker states the facts upon which he bases his opinion, if those facts are either incomplete, or if his assessment of them is erroneous, the statement may still imply a false

> assertion of fact. Simply couching such statements in terms of opinion does not dispel these implications; . . .

Id. at 18.

The Court of Appeals was clear in its opinion that the first three statements which it analyzed, it determined were decidedly statements of opinion and not fact, thereby concluding its analysis. (Pet. App. 13-14). Even assuming arguendo that these statements taken alone were opinion and not fact, as in *Milkovich,* the totality of the article, including its title, creates the distinct implication that the Petitioner's contentions were fictitious and that he was not of sound mind/paranoid. This is further evidenced by a second article, not subject to the original libel claim solely due to the lower courts granting of the Respondent's motion to strike, in which the editor in chief further states, "his claims were not only fantastic, but also unsubstantiated." (Pet. App. 71). In fact, plaintiff *has* substantiation for all of his claims of unfair treatment, including but not limited to (a) significant contradictions in testimony by the principals; (b) missing tests which would have laid the entire issue to rest which were destroyed by two of his professors *while* the inquiry was pending; (c) proximity between the in-class McCarthy exchange and the barely failing grades; the list goes on. These articles put the death knell in plaintiff's 50-year fight to seek re-admission to the UCLA Law School.

The article, when viewed in its entirety, combined with its audience (the very people he was petitioning to), exceeds the boundary of an opinion piece, and instead implies false factual statements including Petitioner's lack of credibility and untrustworthiness. The Court of

Appeals, however, failed to look to the totality of the circumstances surrounding the article and instead chose to complete its legal analysis based only on five specified statements contained within the article treated separately without the benefit of context required by *Baker v. Los Angeles Herald Examiner*, 42 Cal. 3d 254 (1986). When viewed in its entirety, the article involved in this case is the type of defamatory article that this court chose not to constitutionally protect in *Milkovich*.

Finally, since plaintiff is not a public figure, and since the article, when considered in its entirety in light of its audience and context, clearly subjects plaintiff to mockery and ridicule and contains many statements of purported "opinions" which imply false facts, the decision by the Court of Appeals must be reversed.

CONCLUSION

For all of the aforementioned reasons, the Petitioner respectfully requests that this Court grant the petition for writ of certiorari.

Respectfully submitted,

ALEX COTA
Petitioner in Pro Per
P.O. Box 24352
Los Angeles, CA 90024
Telephone 310/474-1672

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF
THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

ALEX COTA, Plaintiff and Appellant, v. DAVID SIMONTON et al., Defendants and Respondents.	B138922 (Los Angeles County Super. Ct. No. BC208017) (Filed Dec 05 2000)

APPEAL from a judgment of the Superior Court of Los Angeles County, Judith Chirlin, Judge. Affirmed and remanded.

Alex Cota, in pro. per., for Plaintiff and Appellant.

Gutierrez, Preciado & House and Calvin House for Defendants and Respondents.

* * *

This appeal is from entry judgment following an order granting respondents' Code of Civil Procedure section 425.16[1] motion to strike appellant Alex Cota's libel action against David Simonton (Simonton), the student editor of the University of California at Los Angeles

[1] All further statutory references are to the Code of Civil Procedure unless otherwise indicated.

(UCLA) Law School (the Law School) newsletter (*The Docket*), Susan Westerberg Prager (Prager), the dean of the Law School, and the Regents of the University of California.

The libel action alleged that an April 1998 article in *The Docket*, "The Strange Tale of J. Alex Cota," libeled appellant, impairing his efforts to gain readmission to the law school and become a lawyer. The *Docket* article discussed appellant's claim that he had been given undeservedly low test scores in the early 1950's in retaliation for his opposition to McCarthyism at the law school, concluding that his claims could not be substantiated.

The motion to strike was granted on the grounds that the libel claim involved the exercise of free speech on a matter of public concern, and that appellant failed to demonstrate likelihood of prevailing on the merits of the claim. We affirm.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

In April 1998, *The Docket*, a student newspaper of the UCLA Law School, published an article, "The Strange Tale of J. Alex Cota," concerning appellant's claims that in the early 1950's he had been given undeservedly low grades which precluded him from continuing as a student at the Law School, and that the low grades had been given in retaliation for Cota speaking out against McCarthyism. The article also discussed appellant's subsequent attempts to gain readmission.

Earlier in 1998, the UCLA student newspaper, *The Daily Bruin*, had run an article concerning faculty loyalty oaths at UCLA during the 1950's.

The April 1998 *The Docket* article was initiated by appellant when he telephoned *The Docket's* office in spring 1998 and spoke with respondent Simonton, a third-year law student and coeditor-in-chief of the paper. In this phone call, appellant explained to Simonton that he had been a law student at UCLA during the 1950's, that his legal career had been wrongfully terminated by undeservedly low grades inflicted upon him in retaliation for his opposition to McCarthyism during the torts class of Law School Dean L. Dale Coffman (Coffman), and that he had attempted to gain readmission to the Law School through subsequent petitions and legal action. At the close of the conversation, Simonton invited appellant to a face-to-face interview, and asked if appellant wanted an article written about him. Appellant told Simonton that he did want an article written about his situation, and informed Simonton that an editorial regarding his plight had been written in a 1980 edition of *The Docket*. A 1980 *The Docket* editorial had urged that appellant be readmitted to the Law School, and was accompanied by an article entitled "And Justice for All – Except Alex Cota," which contained the same information that appellant told Simonton.

Appellant sent Simonton documents related to his correspondence with university officials and his prior related lawsuit, as well as copies of newspaper articles concerning attorneys who had been criminally convicted or formally disciplined. These documents were later discussed in a face-to-face meeting between Appellant and

Simonton. At the conclusion of the meeting, appellant asked Simonton if Simonton would be willing to circulate a petition calling for his reinstatement at the Law School; Simonton demurred, but referred appellant to the Law School student body president.

As part of his investigation of appellant's claim, Simonton interviewed three other individuals, two of whom had been on committees that had reviewed appellant's applications for readmission.

Simonton's conclusion from the totality of what he had learned about appellant's claim that he had been unjustly excluded from the Law School due to speaking out on McCarthyism was, in the final analysis, that the claim could not be substantiated.

Simonton's article was published in the April 1998 edition of *The Docket*. The article quoted appellant, related some facts without specific attribution, reported actions Simonton had taken to attempt to verify appellant's allegations, and included statements reporting Simonton's thought processes and subjective opinions.

The following edition of *The Docket*, in May 1998, included a note which referred to a complaint by appellant regarding the April 1998 article; the note corrected what was characterized as a misstatement in that article. The misstatement was a reference in the April 1998 *The Docket* article to an earlier *Daily Bruin* article. *The Docket* article had described the *Daily Bruin* article as having reported that during the McCarthy era the University of California had required its faculty to sign loyalty oaths pledging allegiance to the United States Constitution. The correction indicated that the 1950's faculty oaths did not

swear allegiance to the United States Constitution, but instead required a disclaimer of membership in the Community Party.

When appellant was unsuccessful in obtaining a retraction of the April 1998 *The Docket* article, he filed suit.

The Complaint

On July 26, 2000, appellant filed the operative pleading in this matter, a first amended complaint for libel. According to the complaint, appellant was a UCLA law student in 1951-1952, spoke up in a class taught by L. Dale Coffman, the dean of the Law School, regarding comments Coffman made which apparently espoused McCarthyism, and as a result of appellant's statements, Coffman and two other professors conspired to give appellant first-year grades below those required to stay in school. The complaint further alleged that: the timing of Coffman's notification to appellant of his low grade precluded appellant from raising his grade average by attending summer school; that Coffman and another professor who had given appellant a low grade destroyed the examinations, so their deceit could not be detected; and that appellant continued his attempts to secure readmission to the Law School.

The complaint alleged that the 1998 *The Docket* article was written untruthfully and libelously "mocking the good sense and even implying the irrationality of plaintiff," and identified the following allegedly libelous statements:

1. " 'Cota . . . jumped into a lengthy condemnation of McCarthyism and loyalty oaths, the passion of his tone indicating that this topic held a great deal of personal relevance for him. "It was a scary time then," he somberly remembered.' "[2]

2. "Cota rose to his feet and asked Coffman if he was afraid of Joe McCarthy."[3]

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[2] "As the jangling of the office phone pierced the silence of our office, my co-editor and I quickly exchanged an [sic] hopeful glance. *The Docket's* financial situation had reached rock bottom, and this very well might be our long-awaited return call from an interested advertiser. For several minutes I sat in anxious expectation, hoping to hear my associate say something suggesting that a full-page ad was in the works. Instead, I watched a puzzled expression slowly creep across his face. 'Actually, I haven't read anything about a loyalty oath at UCLA,' he finally interjected, obviously growing weary of the mostly one-way conversation. [¶] 'I know what he's talking about,' I muttered, motioning for the phone. The day before, *The Daily Bruin* had run a feature story on how during the McCarthy era the University of California required its faculty to sign an oath pledging allegiance to the US Constitution. 'Let me speak with him,' I said. My co-editor thankfully handed the receiver over to me, and I introduced myself to the mysterious caller. [¶] 'My name is J. Alex Cota,' he replied. 'I was a first-year law student at UCLA in 1952, when Dale Coffman was Dean of the Law School.' Mr. Cota then jumped into a lengthy condemnation of McCarthyism and loyalty oaths, the passion of his tone indicating that this topic held a good deal of personal relevance to him. 'It was a scary time then,' he somberly remembered."

[3] "Cota explained that Coffman, the first dean of [UCLA Law School], was the professor for his first-year Torts class. One day, the National Lawyers Guild, a politically liberal association of attorneys, distributed leaflets to the student body promoting a national tour. That same day, according to Cota, Coffman

3. "I began to see another side to Alex Cota: the bitter, determined cynicism of a man who genuinely feels that he has been screwed by the system."[4]

4. " 'So it had all boiled down to that: a massive McCarthyist conspiracy against Mr. Cota. I guess the great thing about conspiracy theories is that they are tautological; once you accept the thesis, any lack of evidence (or the existence of contrary evidence) only helps *prove* the conspiracy. But while that type of proof might

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encouraged his students to not associate themselves with the Guild, as doing so might hamstring their future careers. What especially disturbed Cota, however, was the language with which Dean Coffman expressed his opinion, language reminiscent of the 'guilty by association' jargon of McCarthyism: 'Birds of a feather flock together.' [¶] As a first-year student, Cota was almost too scared to voice an objection to his professor's statement. 'My knees were shaking,' he remembered. 'But I had to say something." Cota rose to his feet and asked Coffman if he was afraid of Joe McCarthy."

[4] "Within a week, *The Docket* received a bulging letter with no name on the return address. Inside, I found multiple scraps of photocopied documents, evidently sent by Cota. Several of these photocopies were of various correspondences between Mr. Cota and University officials. Other clippings were from newspaper articles praising Cota's many acts of community service. [¶] Other newspaper stories, however, I found to be genuinely disturbing: 'Hanna Enters Plea of Guilty'; 'Judge sentences former SM layer to year in jail'; 'Lawyer to be tried on theft, forgery charges.' As I read the notations that Cota had scribbled in the margins, I came to realize why Cota had sent these articles to me – these people were UCLAW graduates who had been accused of ethical and criminal violations. Reading through these clippings, I began to see another side to Alex Cota: the bitter, determined cynicism of a man who genuinely feels that he has been screwed by the system."

suffice for an Oliver Stone screenplay, it isn't the stuff of good investigative journalism."[5] (Original italics.)

5. " 'We will never know whether Dean Coffman sabotaged Alex Cota's Torts exam. . . . ' "[6]

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[5] "As Cota painstakingly went through his records with me, however, a single question kept haunting me: what score did Dean Coffman give Cota on that examination? After a while, I could wait no longer, and began to flip through Coffman's certified Answer on my own. Finally, I found a passage dealing with Cota's grade on the Torts final. Desperately expecting to find some clear-cut proof of Cota's amazing allegations, I began reading from the worn pages: 'Respondent further admits that Petitioner received a score of. . . . ' [¶] Sixty three? I felt my stomach sink as I read the excerpt once again. Wasn't 63 the minimum score that would have allowed Cota to *continue* his studies at UCLAW? If his cumulative GPA was 62.7, didn't that mean that at least one other professor – someone *other* than Coffman – gave him a *lower* grade on a final exam? From Coffman's Answer, I learned that Cota had received a score of 59 from Professor Perkins in Criminal Law, and a score of 57 from Professor Verrall in real Property. [¶] I promptly interrupted Cota to inquire about his other grades. 'Oh,' he explained, apparently somewhat bothered by the distraction from matters that he considered more relevant, 'Perkins and Verrall were Coffman's henchmen." Then, almost without missing a beat, he quickly returned to his expansive list of inconsistencies. [¶] So it had all boiled down to that: a massive McCarthyist conspiracy against Mr. Cota."

[6] "We will never know whether Dean Coffman sabotaged Alex Cota's Torts exam; any evidence of that has long been swept from the fireplace of a man who died many years ago. And we will never know whether in buring that exam, Coffman intended to destroy the evidence of some personal vendetta against Cota. We do know, however, that Alex Cota is a good man, a man who served his country in World War II, a man who helps run the nonprofit Eastside-Westside Concerned Citizens Committee, and a man who sincerely wants a law degree so that

The Special Motion to Strike

On September 3, 1999, Simonton and Regents filed a special motion to strike under section 425.16, on the grounds that the sole cause of action pleaded in the complaint arose from the exercise of respondents' free speech rights, and appellant could not establish a probability of prevailing on the merits because the statements on which he based his complaint were not defamatory, nor could he establish actual malice. Prager joined in the motion.

Appellant opposed the special motion to strike on the grounds he would prevail on the merits of his claim of libel. He specifically contended that: alleged wrongdoing by a former dean of the Law School is not a matter of Public interest; he is not a public figure; even if he were a public figure, the article demonstrated actual malice.

At the hearing on the motion to strike, appellant's argument focused on his claim that it was probable that he would prevail on his libel claim, because the *The Docket* article falsely stated that he was opposed to oaths to support the United States Constitution, and this false statement impaired his ability to become a lawyer.

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he may better help those in need. We also know that Joe McCarthy and his adherents unfairly treated many American citizens because of thier supposedly 'un-American' political views. Based upon what we *know*, however, we cannot say that J. Alex Cota was one of them." (Origianl italics.)

APPELLANT'S CONTENTIONS

Appellant contends that the court erred: (1) failing to examine the full content of the article and the audience to which it was directed; (2) failing to consider the harm the article inflicted on appellant's reputation and on his ability to petition for reinstatement to the law school; and (3) failing to consider a correction to the story which appeared in the following issue of the newspaper. He also argues that the court's judgment was contrary to the intent of section 425.16, and contrary to the First Amendment of the United States Constitution and contrary to article IX, section 9 of the California Constitution.

DISCUSSION

A Section 425.16 Motion to Strike Was Appropriate.

Section 425.16 provides a procedural remedy to protect defendants' free exercise of First Amendment rights on matters of public interest. (*Lafayette Morehouse, Inc. v. Chronicle Publishing Co.* (1995) 37 Cal.App.4th 855, 865.) The purpose of section 425.16 is set forth in the statute, which states: "(a) The Legislature finds and declares that there has been a disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and redress of grievances . . . it is in the public interest to encourage continued participation in matters of public significance, and that this participation should not be chilled through abuse of the judicial process." (§ 425.16, subd. (a).)

Section 425.16, subdivision (a) specifies that it "shall be construed broadly," and that any cause of action

against a person for exercising his right of free speech in connection with a public issue must be stricken unless the court finds a "probability" that the plaintiff will prevail on his claim (§ 425.16, subd. (b).) The statute specifically protects "conduct in furtherance of the exercise of the constitutional right of . . . free speech in connection with a public issue or an issue of public interest." (§ 425.16, subd. (e); *Braun v. Chronicle Publishing Co.* (1997) 52 Cal.App.4th 1036, 1044-1045.) Speech which involves allegations of wrongdoing by public officials involves matters of public concern. (*Southern Cal. Rapid Transit Dist. v. Superior Court* (1994) 30 Cal.App.4th 713, 728.)

A motion to strike under section 425.16 must be supported and opposed by declarations stating facts upon which the liability or defense is based. (§ 425.16, subd. (f).) The defendant must make a prima facie showing that the plaintiff's lawsuit arises from the defendant's exercise of free speech rights in connection with a public issue. (*Dixon v. Superior Court* (1994) 30 Cal.App.4th 733, 745.) Once the defendant makes the prima facie showing, the burden shifts to the plaintiff to establish a "probability" that it will prevail on whatever claim is asserted. (*Ibid.*)

To establish probability of prevailing, a plaintiff must show a claim which, if supported by facts, is sustainable as a matter of law, and that the claim is supported by competent, admissible evidence within the declarant's personal knowledge. (*Church of Scientology v. Wollersheim* (1996) 42 Cal.App.4th 628.)

When the standard of proof at trial is "clear and convincing evidence," such as in a claim involving defamation or punitive damages, a plaintiff's burden in opposing a motion to strike must meet that higher standard. (*Conroy v. Spitzer* (1999) 70 Cal.App.4th 1446, 1451-1452.)

Appellant Did Not Demonstrate Probability of Prevailing on the Merits of his Libel Action.

Libel is a species of defamation (Civ. Code, § 44), "a false and underprivileged publication by writing . . . which exposes any person to hatred, contempt, ridicule, or obloquy, . . . which has a tendency to injure him in his occupation." (Civ. Code, § 45.)

Appellate courts subject libel allegations to independent review, examining the statements in issue and the circumstances under which they are made against the backdrop of the entire record. (*Robertson v. Rodriguez* (1995) 36 Cal.App.4th 347, 358.)

An essential element of libel is a false statement of fact. As a matter of constitutional law, a statement of opinion is not actionable unless a reasonable fact finder could conclude that the published statements imply a probably false factual assertion. (*Copp v. Paxton* (1996) 45 Cal.App.4th 829, 837.) The issue whether a communication was a statement of fact or of opinion is a question of law. Statements that someone was "the worst teacher at [a particular school]" and a "babbler" have been found to be expressions of subjective judgment (*Moyer v. Amador Valley J. Union High School Dist.* (1990) 225 Cal.App.3d 720, 725), as has been the statement that someone's views were "nonsense" (*Copp v. Paxton, supra,* at p. 838) or that

someone was a "shady practitioner" or a "crooked politician" (*Fletcher v. San Jose Mercury News* (1989) 216 Cal.App.3d 172, 191).

California courts have adopted a totality of the circumstances test to determine whether an alleged defamatory statement is one of fact or of opinion. The test looks to the language of the alleged defamatory statement in light of the full content of the communication, and the knowledge and understanding of the audience to whom the communication is directed. (*Jackson v. Paramount Pictures Corp.* (1998) 68 Cal.App.4th 10, 29.)

Three of five of the statements that were the subject of appellant's claims of libel were decidedly statements of opinion and not of fact.

Appellant claims that the statement: "I began to see another side to Alex Cota: the bitter, determined cynicism of a man who genuinely feels that he has been screwed by the system" was untrue and libelous on its face. In claiming the quoted statement to be untrue, however, appellant misses the fact that the statement reports Simonton's viewpoint ("I began to see . . . ") an unambiguous statement of opinion.

The quoted language is not, as appellant suggests, a statement of fact couched in terms of opinion, but instead is the type of broad and subjective comment regarded as nonactionable opinion.[7] While we agree that the article's

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[7] The statement, "In my opinion Mary is a liar," implies knowledge of specific facts leading to the conclusion that Mary told a false statement, and is actionable as a fact. In contrast, the statement "In my opinion, Mary shows her abysmal ignorance

characterization of appellant's allegations as a massive tautological conspiracy theory suggested that appellant was unreasonable, the opinion expressed in the article, i.e., that events that appellant construed as a [sic] evidence of conspiracy could more reasonably be construed as negating a conspiracy, does not transmute into a verifiably false *fact* on the basis of appellant's strong attachment to his own belief. Similarly, the statement that "[w]e will never know whether Dean Coffman sabotaged Alex Cota's Torts exam" cannot provide a *factual* basis for libel, notwithstanding appellant's certainty that the issue of sabotage has been proven to his satisfaction.

The two remaining statements which appellant contends were libelous involve statements of fact, but as we explain below, neither statement is actionable as libel.

An individual who voluntarily injects himself or is drawn into a particular public controversy thereby becomes a public figure for a limited range of issues. (*Gertz v. Robert Welch, Inc.* (1974) 418 U.S. 323, 351.)

A three-step analysis is involved in determining whether an individual is a public figure for a limited range of issues. The courts must first find that there was a public controversy. Next, the courts examine whether the plaintiff undertook "some *voluntary* act through which he seeks to influence the resolution of the public issues involved." (*Reader's Digest Assn. v. Superior Court* (1984) 37 Cal.3d 244, 254, original italics.) In assessing whether

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by accepting the teachings of Joe McCarthy," would not be actionable. (*Milkovich v. Lorain Journal Co.* (1990) 497 U.S. 1, 19-20.)

an individual is a limited purpose public figure, courts look for evidence of affirmative actions by which purported "public figures" have thrust themselves into the forefront of particular controversies. (*Id.* at pp. 254-255.) It is sufficient that the plaintiff attempts to thrust himself into the public eye (*Rudnick v. McMillan* (1994) 25 Cal.App.4th 1183, 1190) or attempts to influence public opinion. (*Okun v. Superior Court* (1981) 29 Cal.3d 442, 451.) Finally, the alleged defamation must have been germane to the plaintiff's participation on the controversy. (*Copp v. Paxton, supra,* 45 Cal.App.4th at p. 846.)

The issues of McCarthyism and retaliation against UCLA law students for their expression of political beliefs are matters of public controversy. Since appellant instigated the *The Docket* article and attempted to influence public opinion through it, we conclude that he is a public figure with respect to the subject matter of the article.

Public figures must prove by clear and convincing evidence that an allegedly defamatory statement was made actual malice, knowledge of its falsity or with reckless disregard of its truth or falsity. (*New York Times v. Sullivan* (1964) 376 U.S. 254, 296.) The rationale for imposing this burden on a public figure lies in the consideration that public figures, like public officials, have voluntarily exposed themselves to increase risk of injury from defamatory statements. (*Reader's Digest Assn. v. Superior Court, supra,* 37 Cal.3d at p. 253.) Reckless disregard must be proven by sufficient evidence to permit the trier of fact to conclude that the defendant had in fact entertained serious doubts as to the truth of the publication. (*St. Amant v. Thompson* (1968) 390 U.S. 727, 731.)

Recklessness is not measured by whether a reasonably prudent person would have published; instead, it involves publication with awareness of a high degree of probable falsity. (*Jackson v. Paramount Pictures Corp.* (1998) 68 Cal.App.4th 10, 33.)

Consequently, appellant's burden in prevailing on the motion to strike was to prove by admissible evidence the probability of proving at trial, by clear and convincing evidence, that an allegedly defamatory statement was made either with knowledge of the falsity of the statement or with reckless disregard of the statement's truth or falsity.

Neither of the two factual statements upon which appellant bases his claim of libel, however, appear to be false statements.

The first allegedly libelous statement, describing appellant's condemnation of McCarthyism and loyalty oaths, unambiguously referred to in the 1950's and loyalty oaths as they existed at that period of time.[8] The allegedly libelous statement was preceded by mention of a *Daily Bruin* article which had discussed McCarthy-era University of California requirements that faculty sign an oath pledging allegiance to the United States Constitution.

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[8] The alleged libelous statement read: "Cota . . . jumped into a lengthy condemnation of McCarthyism and loyalty oaths, the passion of his tone indicating that this topic held a good deal of personal relevance for him. 'It was a scary time then,' he somberly remembered."

In his complaint, appellant contended that this passage "urged falsely and libelously that plaintiff objected to the principles of the United States and California Constitution[s]." We disagree that this passage may reasonably be read to communicate that appellant objects to the principles of the United States and California Constitutions, or that appellant opposes swearing an oath of allegiance to either Constitution. Instead, we read the quoted language as stating that appellant expressed opposition to loyalty oaths as they existed in the 1950's[9] and find this to be a true statement.

Finally, insofar as appellant's libel complaint was based on the allegation that the statement in *The Docket* article that "Cota rose to his feet and asked Coffman if he was afraid of Joe McCarthy" was false and damaging, even assuming Simonton to have erroneously attributed this statement to appellant, we find no basis for libel. A slight inaccuracy in details is not a basis for libel if the inaccuracy does not affect the reader differently. (*Sipple v. Foundation for National Progress* (1999) 71 Cal.App.4th 226, 244.)

It is undisputed that appellant had an in-class exchange regarding McCarthyism with his torts professor, Dean Coffman. In his declaration in opposition to the motion to strike, appellant states that Coffman admitted during a deposition that appellant had asked him during class if he were afraid of Joe McCarthy. Appellant showed a transcript of Coffman's deposition testimony to

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[9] As appellant points out in his complaint, the loyalty oaths of the McCarthy period were very different from current oaths of allegiance.

Simonton. Simonton recalled appellant describing having asked Coffman during class if Coffman were afraid of McCarthy.

In the same declaration in which appellant stated that Coffman had admitted that appellant had asked Coffman if he were afraid of McCarthy, appellant describes a different in-class exchange about McCarthyism with Coffman, one in which Coffman attacked the National Lawyers' Guilt and used the phrase "guilt by association," to which appellant responded that "guilt by association" sounded like McCarthyism.

Even assuming, arguendo, that the description of the Coffman incident that appeared in *The Docket* was false, appellant nevertheless presented insufficient competent evidence to demonstrate a probability of proving that the statement describing his questioning of Coffman was published with actual malice *or* that the statement exposed appellant to "hatred, contempt, ridicule, or obloquy" or injury "in his occupation" within the meaning of Civil Code section 45.

We therefore conclude that the trial court did not err in concluding that appellant had failed to demonstrate a probability of success in his action for libel.

Finally, because appellant did not argue in the trial court that section 425.16 was constitutionally violative, and he has provided no authority for supporting his contention that section 425.16 violates either the First Amendment to the United States Constitution or article IX, section 9 of the California Constitution, we consider this issue waived. (*Doers v. Golden Gate Bridge etc. Dist.*

(1979) 23 Cal.3d 180, 184-185; *Golden Day Schools, Inc. v. Department of Education* (1999) 69 Cal.App.4th 681, 695.)

Respondents are entitled to attorney fees and costs on appeal. (§ 425.16, subd. (c); *Dove Audio, Inc. v. Rosenfeld, Meyer & Susman* (1996) 47 Cal.App.4th 777, 785.

DISPOSITION

The judgment is affirmed. Respondents are awarded costs and attorney fees. The matter is remanded to the trial court for a determination of those amounts.

NOT FOR PUBLICATION.

/s/ Nott, J.
NOTT

We concur:

/s/ Boren, P.J.
BOREN

/s/ Cooper, J.
COOPER

Court of Appeal, Second Appellate District, Division Two – No. B138922

S094444

IN THE SUPREME COURT OF CALIFORNIA

En Banc

ALEX COTA, Plaintiff and Appellant,

v.

DAVID SIMONTON, Defendant and Respondent.

(Filed Mar. 14, 2001)

Petition for reveiw DENIED.

/s/ GEORGE
Chief Justice

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Attorneys for Plaintiff
Alex Cota

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES

ALEX COTA, Plaintiff, v. DAVID SIMONTON, THE DOCKET, an unincorporated association, SUSAN WESTERBERT-PRAGER, THE BOARD OF REGENTS OF THE UNIVERSITY OF CALIFORNIA, and DOES 1 to 20, Defendants.	No. BC208017 FIRST AMENDED COMPLAINT FOR DAMAGES FOR LIBEL (Filed Jul. 26, 1999)

Plaintiff ALEX COTA alleges:

1. At all times herein mentioned plaintiff ALEX COTA was and now is gainfully employed and resident in the city of Los Angeles, California. Plaintiff has resided in the said city for a number of years past.

2. Defendants DAVID SIMONTON (hereafter "SIMONTON") and SUSAN WESTERBERG-PRAGER (previously incorrectly identified as "SUSAN WESTERBERG", hereafter "WESTERBERG-PRAGER") at all relevant times mentioned herein were residents of the County of Los Angeles, State of California.

3. Defendant WESTERBERG-PRAGER at all relevant times herein mentioned was the Dean of the School of Law at the University of California at Los Angeles. Defendant WESTERBERG-PRAGER had control of THE DOCKET, which was subject to her supervision. Defendant WESTERBERG-PRAGER had facts and knowledge readily accessible to her and readily at hand to refute the falsehood and innuendos in the Article, but at all times refused to make any use of such knowledge and facts or to correct the Article.

4. Defendant BOARD OF REGENTS OF THE UNIVERSITY OF CALIFORNIA (hereafter REGENTS) is a public corporation created in California and charged with the operation and supervision of the University of California.

5. Defendant THE DOCKET at all times mentioned herein has published a monthly newspaper at the University of California at Los Angeles. This is done under the auspices and control of the REGENTS and the UCLA Law School. This newspaper deals inter alia with Law School of the University of California at Los Angeles and with legal matters.

6. Plaintiff is ignorant of the true names and capacities of the defendants sued herein as Does 1 to 20. Plaintiff will ask leave to amend the complaint to state the true

names and capacities. Plaintiff will amend this complaint to allege the true names and capacities of the fictitiously named defendants as they may be ascertained. Plaintiff is informed and believes and thereon alleges that each of the fictitiously named defendants is responsible in some manner for the occurrences and activities herein alleged and that plaintiff's damages as herein alleged were to some extent caused by their conduct.

7. The defendants and each of them were agents of the co-defendants and in doing the things herein alleged were acting within the course and scope of such agency and the permission of their co-defendants.

8. In the April, 1998, edition of THE DOCKET, defendants printed, published, and circulated or caused to be printed, published and circulated in the said paper, on pages 1, 6, and 12, an article relating to the plaintiff. The said article (hereinafter "Article") was written by defendant SIMONTON, Editor in Chief of THE DOCKET, and it is set out in full in Exhibit A, attached hereto, and made a part hereof by reference as fully as though set out again at length.

Though the Article by defendant SIMONTON has a window dressing which sometimes seems to show courtesy or sympathy for plaintiff, in reality it is written untruthfully, libelously, and with the intent of defending old and wrongful actions of the UCLA Law School against plaintiff, and untruthfully libeling plaintiff and mocking the good sense and even implying the irrationality of the plaintiff.

9. The origins of the article came about in this way. Plaintiff had been in the United States Army, and wanted

to use his GI Bill educational benefits to go to law school. His aspiration was, and still is, to become a graduate of the UCLA Law School and to go on to [ractice [sic] as an attorney in California working toward social betterment and justice. Plaintiff entered the UCLA Law School in 1951-52 in a period where Senator Joe McCarthy was a leading proponent of wild and unsubstantiated attacks upon the American government and the United States Army.

As it happened, the first dean and a professor of the UCLA Law School was L. Dale Coffman, who was an ardent follower of Joe McCarthy and McCarthyism. Dean Coffman not only held such views but insisted on introducing them intrusively into his tort law class, where they had no proper place.

Plaintiff entered UCLA Law School in the School year 1951-52. His aspiration was, and still is, to become a graduate of the law school and go on to practice as an attorney in California working towards social betterment and justice.

Dean Coffman harangued plaintiff's torts class students about the stringent need for the students to avoid associating with liberals lest they be tainted and suffer guilt by association. Plaintiff, after enduring the harangue spoke up, saying that the dean's comments appeared to relate to McCarthyism. The dean then sharply attacked plaintiff and mocked him; and became determined to achieve plaintiff's failure and exclusion from the law school.

Then, working with likeminded professors at the law school, Professors Perkins and Verrell, Dean Coffman

improperly and wrongly so downgraded the year examinations of plaintiff that plaintiff's average was reduced to 62.7. The average needed to stay in school on a regular basis was 65. The average grade needed to stay in school on a probationary basis that is, a grade which would in a subsequent school year need to be raised to an overall average of 65, was 63. The probationary requirement was just 0.3 above what plaintiff was improperly reduced to after being wrongfully downgraded.

Plaintiff strove earnestly to remain in school. But Dean Coffman of the Law School deliberately notified him so belatedly of the grades that the notification came when the first summer session was finished and even the second summer session (at either of which, despite the improper downgrading, he might have raised his grades and so remained in school) was already started. Thus plaintiff was given no chance to enter the summer school or to remain in school.

Further, Dean Coffman, to whom plaintiff had protested his grades, nonetheless knowingly, willfullly [sic] and maliciously destroyed the critical evidence of plaintiff's torts examination without permitting inspection by plaintiff, or preserving the examination for impartial inspection by others. This destruction was done to try to avoid detection of the wrongful and improper downgrading. Professor Perkins permitted brief partial inspection by plaintiff of the essay portion of plaintiff's examination, but not of the multiple choice portion; and then Professor Perkins destroyed plaintiff's examination, for the same purpose and with the same motives as Dean Coffman, and in concert with Dean Coffman and Professor Verrell. Plaintiff, thrown out of the law school by virtue of these

wrongs done to him, has never been readmitted despite his efforts toward readmission.

The Article was written by defendant SIMONTON the THE DOCKET following discussions between plaintiff and defendant SIMONTON and UCLA law school personnel. Before writing the Article, defendant SIMONTON was given substantial access by plaintiff to legal and other materials dealing with plaintiff and his relations to the UCLA law school and its personnel.

10. The Article states:

> "The day before, the Daily Bruin had run a feature story on how during the McCarthy era, the University of California required its faculty to sign an oath pledging allegiance to the U.S. Constitution . . .
> . . . Cota . . . jumped into a lengthy condemnation of McCarthyism and loyalty oaths, the passion of his tone indicating that this topic held a good deal of personal relevance to him. 'It was a scary time then,' he somberly remembered." (Page 1, Columns 1-3).

The article implies that plaintiff was passionately against subscribing to an oath of allegiance to our constitution. This is untrue and damaging with regard to all, and especially to one who desired and desires to follow the profession of attorney at law.

In truth and in fact, plaintiff was and is passionately attached to the United States and California Constitutions and to their principles. During the 1950's period in question, the loyalty oath required was not a simple statement

of allegiance to the United States and California Constitutions such as is provided by the attorney's oath (Business and Professions Code, section 60607), which provides:

> "Every person on his admission shall take an oath to support the Constitution of the United States and the Constitution of the State of California, and faithfully discharge the duties of an attorney at law to the best of his knowledge and ability. A certificate of oath shall be endorsed upon the license."

The general loyalty oath then required involved also a very different and negative pledge of non-membership in Communist organizations and non-advocacy of overthrow of the government. These additional requirements have long since ceased to be demanded in the oath of office. Defendants also knew that plaintiff had no objection to the simple standard oath of allegiance to the United States constitution and its principles. Plaintiff condemned only the demeaning and now long-abandoned additional provisions abjuring membership in various organizations and various supposed beliefs.

Still the Article urged falsely and libelously that plaintiff objected to the principles of the United States and California Constitution.

10. The Article is libelous on its face in hat it states that plaintiff has bitter determined cynicism against the system. (Page 12, Column 1). This is untrue and libelous on its face.

11. The Article states:

> "Cota explained that Coffman, the first dean of the UCLA Law School, was the professor for his

> first-year Torts class. One day, the National Lawyers Guild, a politically liberal association of attorneys, distributed leaflets to the student body promoting a national tour. That same day, according to Cota, Coffman encouraged his students to not associate themselves with the Guild, as doing so might hamstring their future careers. What especially disturbed Cota, however, was the language with which Dean Coffman expressed his opinion, language reminiscent of the "guilt by association" jargon of McCarthyism: "Birds of a feather flock together."
>
> As a first-year student, Cota was almost too scared to voice an objection to his professor's statement. "My knees were shaking," he remembered. "But I had to say something." Cota rose to his feet and asked Coffman if he was afraid of Joe McCarthy. (Page 1, Column 4; Page 6, Column 1).

The Article is false, libelous and damaging in stating that plaintiff asked Dean Coffman whether he was afraid of McCarthy. The Dean was an ardent supported of Joe McCarthy. It would have been absurd and illogical for plaintiff to inquire whether the Dean was afraid of McCarthy. Such inquiry would have been grossly disjointed and irrelevant.

12. The Article states:

> "So it had all boiled down to that: a massive McCarthy is conspiracy against Mr. Cota. I guess the great thing about conspiracy theories is that they are tautological; once you accept the thesis, any lack of evidence (or the existence of any contrary evidence) only helps prove the

> conspiracy. But while that type of proof might suffice for an Oliver Stone screenplay, it isn't the stuff of good investigative journalism." (Page 12, Columns 3 and 4).

In truth and in fact, plaintiff's complaints are not properly thus characterized, and the mocking comments about conspiracy falsely denigrate plaintiff's judgment and the reasonableness of his position.

These statements are false and damaging to plaintiff both generally and in terms of special damage to his work, reputation and his continuing desire to be accepted within the legal profession and as a student at UCLA School of Law.

13. The Article states:

> "We will never know whether Dean Coffman sabotaged Alex Cota's Torts exam; any evidence of that has long been swept from the fireplace of a man who died many years ago. And we will never know whether in burning that exam Coffman intended to destroy the evidence of some personal vendetta against Cota." (Page 12, Column 4).

But this is libelous and untrue. In truth and in fact, it can be and is known, with reasonable certainly, that Dean Coffman sabotaged plaintiff's Torts exam and by this subterfuge managed to throw plaintiff out of the UCLA School of Law.

Even within the confines of the Article itself, it is clear that Dean Coffman actually destroyed the plaintiff's Torts exam; and that by his own admission Dean Coffman destroyed the Torts exam six months earlier than was his

regular practice; and that the burning or other destruction of the exam took place at a time when Dean Coffman had already received notice of the filing of plaintiff's Petition challenging the grading of the Torts exam and plaintiff's consequent exclusion as a student from the UCLA School of Law.

The above cited evidence, and other evidence, prove that the quoted portion of the Article is untrue. In fact, (though the Article strives to conceal it rather than admitting it) the deliberate destruction of the significant physical evidence – the examination – when it was known to the examination giver that the grading was seriously questioned, is itself strong evidence that the plaintiff was cheated in the grading. The faulty and untrue implication of the Article is that by managing to destroy the exam, Dean Coffman has made plaintiff's quest for justice a foolish one.

14. The Article was seen and read by many persons, including but not limited to persons on the West side of Los Angeles, and those interested in the law and legal matters generally.

15. The Article was published by defendants maliciously, fraudulently, and oppressively, and in conscious disregard of the rights of plaintiff. Defendants knew or should have known, especially SIMONTON who wrote the article and purportedly investigated into the matter, that the defendant THE DOCKET had long before known and acknowledged in its pages the extreme mistreatment of plaintiff by UCLA Law School and its former dean, Dale Coffman.

Defendants took no pains to avoid telling the many untruths and slurs which appear in the article. Defendants, even when advised orally and in writing of the untruths of the article and even when requested to retract them, failed, neglected and refused to retract them fully or at all. This continued even though defendants well knew how severely plaintiff was affected by the article and how earnest he was in his efforts to correct the situation.

16. Further, defendants originally published the article and permitted it to be published, either knowing it to be false, or at he [sic] least with reckless disregard for whether it was true or false.

17. Defendants were at the very least grossly negligent in publishing the article or permitting it to be published. With any ordinary or reasonable care, defendants would have realized or did realize that the article was grossly obviously false and grossly libelous as to plaintiff. Indeed, the article itself contains material showing some of the falsity.

18. Within twenty days after the article appeared in THE DOCKET, plaintiff served on defendant publisher a demand for correction or retraction as provided by Civil Code, Section 48a. A copy of the demand letter is attached hereto, marked Exhibit B, and incorporated by reference.

19. Despite the demand, defendants failed, neglected, and refused to print a retraction, all to the further damage of plaintiff.

20. As a proximate result of the article's publication, plaintiff has suffered loss of reputation, humiliation, embarrassment, and emotional distress, all to his general damage.

21. As a proximate result of the article's publication, plaintiff has suffered special damages. These include:

A. Injury to plaintiff in his trade and occupation;

B. Injury to his standing in the legal community and to his continuing desire and plan to continue law study at the UCLA School of Law.

22. The above described Article was published by defendant maliciously, oppressively, and fraudulently. Because of this and the facts above alleged, plaintiff seeks punitive or exemplary damages in an amount to be established by proof at trial.

WHEREFORE, plaintiff prays judgment against defendants and each of them, as follows:

1. For general damages as may appear;

2. For special damages as may appear;

3. For punitive damages, against all defendants except Board of Regents;

4. For costs of suit incurred herein; and

5. For such other and further relief as the court may find just and proper in the premises.

DATED: July 23, 1999

STEINBERG & STEINBERG
Attorneys for Plaintiff
ALEX COTA
By: /s/ Larry Steinberg
Lawrence William
Steinberg

EXHIBIT 1

The Strange Tale of J. Alex Cota

By David Simonton
Editor-in-Chief

[Pictures Omitted in Printing]

As the jangling of the office phone pierced the silence of our office, my co-editor and I quickly exchanged an [sic] hopeful glance. *The Docket's* financial situation had reached rock bottom, and this very well might be our long-awaited return call from an interested advertiser. For several minutes I sat in anxious expectation, hoping to hear my associate say something suggesting that a full-page ad was in the works. Instead, I watched a puzzled expression slowly creep across his face. "Actually, I haven't read anything about a loyalty oath at UCLA," he finally interjected, obviously growing weary of the mostly one-way conversation.

"I know what he's talking about," I muttered, motioning for the phone. The day before, *The Daily Bruin*

had run a feature story on how during the McCarthy era the University of California required its faculty to sign an oath pledging allegiance to the US Constitution."Let me speak with him," I said. My co-editor thankfully handed the receiver over to me, and I introduced myself to the mysterious caller.

"My name is J. Alex Cota," he replied." I was a first-year law student at UCLA in 1952, when Dale Coffman was Dean of the Law School." Mr. Cota then jumped into a lengthy condemnation of McCarthyism and loyalty oaths, the passion of his tone indicating that this topic held a good deal of personal relevance to him. "It was a scary time then," he somberly remembered.

As Cota continued, my journalistic curiosity could not help but be piqued. Why the fervent denunciation of McCarthyism? Why was he calling *The Docket*, and why now? And perhaps most importantly, what role did UCLAW and Dean Coffman play in all of this? As is the case with most curious questions, however, the answers that I initially received served only to heighten my curiosity.

Cota explained that Coffman, the first dean of UCLAW, was the professor for his first-year Torts class. One day, the National Lawyers Guild, a politically liberal association of attorneys, distributed leaflets to the student body promoting a national tour. That same day, according to Cota, Coffman encouraged his students to not associate themselves with the Guild, as doing so might hamstring their future careers. What especially disturbed Cota, however, was the language with which

Dean Coffman expressed his opinion, language reminiscent of the "guilt by association" jargon of McCarthyism: "Birds of a feather flock together."

As a first-year student, Cota was almost too scared to voice an objection to his professor's statement. "My knees were shaking," he remembered. "But I had to say something." Cota rose to his feet and asked Coffman if he was afraid of Joe McCarthy. In response, Coffman allegedly described McCarthy as "the greatest American alive today," and challenged Cota to name one person wrongfully accused by the Senator from Connecticut. Still nervous, but not daunted, Cota offered the name of Dean Acheson, then the Secretary of State.

Dean Coffman was apparently not appreciative of Cota's response. According to Cota, Coffman said something like "Given time, he'll get him too," and when Cota attempted to quote newspaper reports to further defend Acheson, Coffman sarcastically inquired into what newspapers Cota had been reading. "It was because of this political disagreement," explained Cota, "that Dean Coffman sabotaged my Torts final and then refused me readmittance into the law school."

At this point, I wasn't sure that I believed what I had just heard. Could it really be that the dean of UCLAW purposefully gave a student a poor grade because of his politics? Could it really be that a UCLAW student was, in effect, "blacklisted" from the school? "I might just have a *real* piece of investigative journalism on my hands," I thought as I implored Cota to continue.

The rest of his story did not disappoint. When Cota attended UCLAW, he explained, the school had not yet

switched to an anonymous grading system. "In fact," he added, "it was because of my case that they stopped having students sign their names to their exams."

Cota's cumulative first-year grade point average was 62.7, a mere 0.3 points below the minimum required GPA of 63.0. Along with his final grades, Cota received a letter from Dean Coffman dated July 31, 1952 stating that, due to his sub-standard grades, he would not be allowed to continue at UCLAW.

Soon after receiving his final grades, Cota visited Coffman in order to review the scoring of his Torts exam. According to Cota, however, Dean Coffman refused to go over his final, insisting that it had been graded fairly. Disappointed, Cota returned home, only to find that a second letter from Coffman had arrived. This letter, also dated July 31, stated that Cota would be allowed to take classes in a six-week summer session to try to raise his GPA above 63.0.

There was only one problem: the summer session was scheduled to begin in two days. Although he was able to enroll, Cota discovered that all of the books for his classes had been sold out. Unable to do the reading for the critical first week, Cota felt that he had no choice but to drop out of summer school. "Dean Coffman *intentionally* sent me two separate letters, both dated July 31, so as to confuse me," he suggested. "The first said that I would not be allowed to continue; the second said that I could, as long as I went to summer school. But Coffman sent out my grades a week late, so I wasn't *able* to attend summer school."

This last allegation gave me a little pause. Although it seemed somewhat odd that Coffman's office would send Cota two separate letters, both dated on the same day, it seemed even odder to attribute this apparent snafu to some invidious conspiracy against Mr. Cota. But then again, if it truly were the case that Coffman sabotaged Cota's final grade because of his political views, then it wouldn't be that much of a stretch for Cota to ascribe the use of two letters to a more sinister motive.

Cota did not allow Coffman's original refusal to review his exam to end the matter. First, he filed an unsuccessful petition for readmission to UCLAW in October of 1952. When that failed, Cota turned to the courts, filing a Petition for Writ of Mandamus against Dale Coffman in his capacity as Dean of UCLAW. The court eventually dismissed Cota's suit, declaring it to be a "University matter." (Los Angeles County Superior Court Case No. 619,033). Even worse, prior to the hearing on Cota's petition but after receiving notice of the suit, Dean Coffman burned Cota's Torts final, the one piece of evidence which might have definitively proven his allegations.

Cota nonetheless continued to seek readmission through administrative channels, petition each new Dean of UCLAW to be allowed to resume his studies. Since the initial review in 1952, the administration has conducted two separate investigations into Cota's allegations. The first of these, headed by Dean Richard Maxwell in the early 1960's, concluded that there was insufficient evidence to support the accusations. The second, commissioned in 1975, found that there was no reason to reverse the prior committee's decision, as there was no new

evidence to bolster Cota's claims of injustice. To Cota, however, these findings missed the point: the only reason that insufficient evidence exists, he maintains, is that Dean Coffman willfully destroyed his final.

In what might be the most bizarre chapter of this prolonged saga, however, Cota did obtain one shot at getting Dean Coffman under Oath. Soon after the court dismissed his mandamus petition, Cota was listening to a radio broadcast by John Lechner, a local right-wing radio personality, in which Lechner called for the impeachment of Governor Earl Warren. When Cota phoned in to protest, Lechner stated one the air that he was a friend of Dean Coffman, that he had read Cota's final exam, and that Cota deserved his grade thereon. Cota seized upon this opportunity, bringing suit against Lechner and Coffman for invasion of privacy, to wit, allowing someone outside of UCLAW to read a student's examination (L.A. County Superior Court Case No. 791,653).

Cota received a default judgment against Lechner, but found his true victory in forcing Coffman to testify at deposition about the events surrounding the grading and destruction of his Torts exam. Cota also took the depositions of several of his fellow students who were present in class for the debate over Senator McCarthy. According to Cota, the transcripts of these depositions contained several inconsistencies which would vindicate his allegations. I asked Cota to bring these transcripts with him to an interview, and he happily agreed. Before hanging up, though, he advised me to look up an old editorial from the October, 1980 issue of *The Docket* that called for his reinstatement.

Excited over the prospect of uncovering a UCLAW scandal, I promptly went to the library to request the back issue. Therein I found the editorial, as well as an article entitled " 'And Justice for All Except Alex Cota' " that repeated the allegations which Cota had leveled against Dean Coffman. The article also described one aspect of Cota's character about which he had talked only sparing: his commitment to community service, and to children in particular. For years, Cota worked as a counselor for the L.A. County Probation Department in the Juvenile Division, and even since leaving the job in 1971, he has consistently lobbied for improvements in the condition of juvenile detainees.

One thing the article did not appear to contain, however, was any objective investigation into Cota's allegation. Determined to be more through than predecessors, I conducted several interviews with members of the faculty and administration, including two who served on committees that reviewed Cota's requests for readmittance.

Unfortunately, my investigation proved to be fairly fruitless. None of the current faculty or administration were at UCLAW during Coffman's deposition much less in 1952. Thus, although I did find one administration official willing to comment on Dean Coffman's personal character, it could not have been based on personal knowledge. Nevertheless, her evaluation was in tune with what I had heard from Cota: that Coffman was a McCarthyist and an authoritarian, and that the reason why UCLAW now has a "weak" deanship is that the faculty had chafed under Coffman's reign.

Although I remained excited about the story, I was still a law student. As a result, the Cota story took a back burner to the more pressing demands of my studies, and I failed to follow up on my promised interview with Mr. Cota for several weeks. Unsurprisingly, however, Cota was far too persistent to let the matter drop. Within a week, *The Docket* received a bulging letter with no name on the return address. Inside, I found multiple scraps of photocopied documents, evidently sent by Cota. Several of these photocopies were of various correspondences between Mr. Cota and University officials. Other clippings were from newspaper articles praising Cota's many acts of community service.

Other newspaper stories, however, I found to be genuinely disturbing: "Hanna Enters Plea of Guilty"; "Judge sentences former SM lawyer to year in jail"; "Lawyer to be tried on theft, forgery charges." As I read the notations that Cota had scribbled in the margins, I came to realize why Cota had sent these articles to me – these people were all UCLAW graduates who had been accused of ethical and criminal violations. Reading through these clippings, I began to see another side to Alex Cota: the bitter, determined cynicism of a man who genuinely feels that he has been screwed by the system. If his story were true then I could not blame him. But if I could not ascertain its truth, I was now not too sure that I wanted to stress that opinion in print.

Nevertheless, I called Mr. Cota to schedule our long-awaited interview. He arrived slightly early, carrying with him a burgeoning manila folder. "I really appreciate your taking the time to hear my story," he said. "The administration never listens, but the students always can

see the injustice." We exchanged pleasantries, then promptly began reviewing the voluminous records of his battles with Dean Coffman and UCLAW.

As was to be expected, his familiarity with his prized deposition transcripts was impressive. Every inconsistency in Coffman's testimony, no matter how minor, was noted and catalogued. At one point, for example, Dean Coffman testified that he did not have the authority to reinstate a student, but Cota noted that the UCLAW Bulletin from 1952 clearly implied the opposite. At another point, Coffman testified that, pursuant to standard procedure, he burned Cota's Torts exam six months after the test. In his certified Answer to Cota's mandamus petition, however, Coffman had stated that he regularly waited one year before destroying students' exams. Moreover, Coffman swore that he eventually agreed to and did review Cota's exam with him, a contention that Cota maintains is false.

As Cota painstakingly went through his records with me, however, a single question kept haunting me: what score did Dean Coffman give Cota on that examination? After a while, I could wait no longer, and began to flip through Coffman's certified Answer on my own. Finally, I found a passage dealing with Cota's grade on the Torts final. Desperately expecting to find some clear-cut proof of Cota's amazing allegations, I began reading from the worn pages: "Respondent further admits that Petitioner received a score of. . . . "

Sixty-three? I felt my stomach sink as I read the excerpt once again. Wasn't 63 the minimum score that would have allowed Cota to *continue* his studies at

UCLAW? If his cumulative GPA was 62.7, didn't that mean that at least one other professor – someone *other* than Coffman – gave him a *lower* grade on a final exam? From Coffman's Answer, I learned that Cota had received a score of 59 from Professor Perkins in Criminal Law, and a score of 57 from Professor Verrall in Real Property.

I promptly interrupted Cota to inquire about his other grades. "Oh," he explained, apparently somewhat bothered by the distraction from matters that he considered more relevant, "Perkins and Verrall were Coffman's henchmen." Then, almost without missing a beat, he quickly returned to his expansive list of inconsistencies.

So, it had all boiled down to that: a massive McCarthyist conspiracy against Mr. Cota. I guess the great thing about conspiracy theories is that they are tautological, once you accept the thesis, any lack of evidence (or the existence of any contrary evidence) only helps *prove* the conspiracy. But while that type of proof might suffice for an Oliver Stone screenplay, it isn't the stuff of good investigative journalism. As our interview drew to a close, with Mr. Cota thanking me again for helping to publicize the near half-century of "injustice" that UCLAW has perpetrated against him, I could not help but feel a little guilty – not only because I knew that my article would probably not be what he had in mind, but also because I [sic] fallen into the same trap as my predecessors at *The Docket*. I had let the thrill of the story, as well as the despicableness of McCarthyism, overwhelm my objectivity.

We will never know whether Dean Coffman sabotaged Alex Cota's Torts exam; any evidence of that has

long been swept from the fireplace of a man who died many years ago. And we will never know whether in burning that exam, Coffman intended to destroy the evidence of some personal vendetta against Cota. We do know, however, that Alex Cota is a good man, a man who served his country in World War II, a man who helps run the nonprofit Eastside Westside Concerned Citizens Committee, and a man who sincerely wants a law degree so that he may better help those in need. We also know that Joe McCarthy and his adherents unfairly treated many American Citizens because of their supposedly "un-American political views. Based on what we know however, we cannot say that J. Alex Cota was one of them.

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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

ALEX COTA, Plaintiff, v. DAVID SIMONTON, et al., Defendants.	CASE NO. BC208017 **SPECIAL MOTION TO STRIKE AND FOR ATTORNEY'S FEES BY DEFENDANTS SIMONTON AND REGENTS OF THE UNIVERSITY OF CALIFORNIA; MEMORANDUM OF POINTS AND AUTHORITIES; DECLARATION OF DAVID SIMONTON**

[Code Civ. Proc. §§ 425.16, 435]

Date: September 28, 1999
Time: 8:30 a.m.
Dept: 34

EXEMPT FROM FEES
Gov. Code, § 6103

TO PLAINTIFF AND HIS ATTORNEY OF RECORD:

PLEASE TAKE NOTICE that on September 28, 1999 at 8:30 a.m. or as soon thereafter as counsel may be heard in Department 34 of the above-entitled Court located at 111 North Hill Street, Los Angeles, California, Defendants DAVID SIMONTON ("Simonton") and REGENTS OF THE UNIVERSITY OF CALIFORNIA ("UC Regents") will ask the Court to hear their motion to strike Plaintiff's Amended Complaint for Damages for Libel (the "Complaint"), and for attorneys' fees, pursuant to Code of Civil Procedure sections 425.16 and 435.

The motion to strike will be based on the following grounds:

1. The sole cause of action pleaded in the Complaint arises from acts of the Defendants in furtherance of their free speech rights under the United States and California Constitutions in connection with a public issue.

2. Plaintiff cannot establish a probability that he will prevail on his libel cause of action, for the following reasons:

a. The statements on which Plaintiff bases his libel claim are not defamatory.

b. Plaintiff cannot prove actual malice

DATED: September 3, 1999

GUTIERREZ, PRECIADO & HOUSE, LLP

By:/s/ Calvin House
Calvin House
Attorneys for Defendants DAVID SIMONTON and REGENTS OF THE UNIVERSITY OF CALIFORNIA

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Defendants UC Regents and Simonton move to strike the complaint under California Code of Civil Procedure section 425.16. That section provides a procedure for testing the evidentiary sufficiency of claims that arise out of acts by a defendant in furtherance of the right of free speech in connection with a public issue. In this case, Plaintiff seeks compensatory and punitive damages because of an article that Simonton wrote for *The Docket*, the UCLA Law School student newspaper, in April 1998. Plaintiff attended the Law School in the early 1950's, but was excluded when his average fell below that required to stay in school. The article was about Plaintiff's claims that a former dean of the Law School had retaliated against him for speaking out against McCarthyism, and about Plaintiff's attempts to gain readmission to the Law School. (A copy of the article is attached as Exhibit A to the Complaint.)

The article concerned a public issue. Therefore, under section 425.16, Plaintiff must show in response to this motion that there is a probability that he will prevail. He cannot do so. As this memorandum of points and authorities explains, the article is not defamatory. It simply reports what Plaintiff told Simonton, and Simonton's opinions about what he was told. In any event, Plaintiff, as a public figure, would have to prove that Defendants acted with actual malice. There is no evidence to support such a claim.

II. FACTUAL BACKGROUND

Plaintiff alleges that he entered UCLA Law School in 1951-52, at a time when "Senator Joe McCarthy was a leading proponent of wild and unsubstantiated attacks upon the American government and the United States Army." (Complaint, p. 4:1-5.) He also alleges that L. Dale Coffman, the first dean of the Law School, "was an ardent follower of Joe McCarthy and McCarthyism." (Complaint, p. 4:6-11.) After allegedly enduring a "harangue" by Dean Coffman in class, Plaintiff spoke up against him. (Complaint, p. 4:17-24.) Dean Coffman allegedly retaliated against him by giving him a low grade, and by convincing other professors to give him low grades. As a result, Plaintiff was not permitted to continue in the Law School. (Complaint, pp. 5-6.) Over the ensuing years, Plaintiff attempted unsuccessfully to gain readmission. (Complaint, p. 6:2-3.)

In the Spring of 1998, Plaintiff contacted *The Docket* to discuss his story. Simonton, a co-editor-in-chief of the paper, interviewed Plaintiff over the telephone and in person, and reviewed many written materials that Plaintiff supplied. Simonton conducted some additional interviews, and then wrote an article about what Plaintiff had told him. He included some of his opinions about the facts reported in the article. (See attached Simonton Declaration.)

III. ARGUMENT

Section 425.16, subdivision (b)(1) provides as follows: "A cause of action against a person arising from any act of that person in furtherance of the person's right of

petition or free speech under the United States or California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim."[1] An act falls within the statute if it is "in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest."[2] The statute also applies to statements "made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law."[3] The statute "shall be construed broadly."[4]

On this motion, Defendants bear the initial burden of showing that the Complaint arises from their free speech activity. Once they have done so, the burden shifts to Plaintiff to "make a prima facie showing of facts which would, if proved at trial, support a judgment in plaintiff's favor."[5] Plaintiff's showing must rest on competent, admissible evidence.[6]

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[1] The "persons" entitled to section 425.16's protection include public entities like Defendant UC Regents. (*Bradbury v. Superior Court* (1996) 49 Cal.App.4th 1108, 1114).

[2] Code Civ. Proc., § 425.16, subd. (e)(4).

[3] Code Civ. Proc., § 425.16, subd. (e)(2).

[4] Code Civ. Proc., § 425.16, subd. (a).

[5] *Church of Scientology of California v. Wollersheim* (1996) 42 Cal.App.4th 628, 646, quoting *Wilcox v. Superior Court* (1994) 27 Cal.App.4th 809, 823.

[6] *Macis v. Hartwell* (1997) 55 Cal.App.4th 669, 675; *Church of Scientology, supra,* 42 Cal.App.4th at p. 654.

B. The Complaint is subject to section 425.16

Defendants may invoke section 425.16 by showing that the Complaint arises out of the exercise of their free speech rights in connection with a public issue or issue of public interest. It is settled that writing and publishing an article in a newspaper constitute acts in furtherance of free speech rights.[7]

There should also be no question that Defendants' article involved a public issue. It concerned Plaintiff's allegations that the dean of a prominent public law school had engaged in wrongful conduct. The performance of a high-ranking public employee like the dean is a matter of public interest.[8] The article also concerned McCarthyism, which continues to interest the public today. For example, when the article appeared, *The Daily Bruins*, the UCLA student newspaper had recently published an article about faculty loyalty oaths at UCLA in the 1950's. (Simonton Declaration, ¶ 3.) Therefore, the article qualifies for the protection of section 425.16 under subdivision (e)(4), as conduct in furtherance of free speech in connection with a public issue.

The article also qualifies for protection under subdivision (e)(2), as a statement in connection with matters under review by a judicial body an in an official proceeding authorized by law. That is because the article discussed Plaintiff's petitions for readmission to the Law

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[7] *Braun v. Chronicle Publishing Co.* (1997) 52 Cal.App.4th 1036, 1045; *Lafayette Morehouse, Inc. v. Chronicle Publishing Co.* (1995) 37 Cal.App.4th 855, 862-864.

[8] *Southern California Rapid Transit Dist. v. Superior Court* (1994) 30 Cal.App.4th 713, 728.

School, and two lawsuits that he filed. His petitions were part of "official proceedings authorized by law." The University of California is a public trust created by the California Constitution.[9] Its policies and resolutions are deemed equivalent to state statutes.[10] His two lawsuits involved issues under consideration by a judicial body. Defendants who meet the standards of subdivision (e)(4) do not have to make a separate showing that the statement involved a public issue. It is enough that the statement involved an issue connected with an official proceeding.[11]

C. Plaintiff cannot establish a probability that he will prevail on his libel cause of action

The elements of libel are (1) a false, (2) unprivileged, (3) statement of fact, (4) which exposes the plaintiff to hatred, contempt or ridicule, or which has a tendency to injure him in his occupation.[12] In a case like this one, which involves matters of public concern, Plaintiff must affirmatively prove falsity.[13] The standard for deciding whether a statement is libelous is whether a normal person would *reasonably* understand it to falsely demean

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[9] Cal. Const., art. IX, § 9.

[10] *Regents of the University of California v. City of Santa Monica* (1978) 77 Cal.App.3d 130, 135.

[11] *Briggs v. Eden Council for Hope and Opportunity* (1999) 19 Cal.4th 1106.

[12] *Copp v. Paxton* (1996) 45 Cal.App.4th 829, 837; Civ. Code, § 45.

[13] *Philadelphia Newspapers, Inc. v. Hepps* (1986) 475 U.S. 767.

plaintiff.[14] "A publication is not responsible for every strained interpretation a plaintiff might put on its words."[15]

A libel claim may *not* be used on a statement of opinion, unless the opinion necessarily implies an undisclosed defamatory fact.[16] Communications that convey subjective judgments fall into the category of protected opinion.[17] Statements of subjective judgment do not become defamatory just because the speaker uses " 'rhetorical hyperbole,' exaggeration, and other colorful language to make a point."[18] The issue of whether a statement contains a statement of fact is a question of law for the Court.[19]

Finally, a public figure plaintiff must show by "clear and convincing evidence" that any defamatory statement

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[14] *Kilgore v. Younger* (1982) 30 Cal.3d 770, 777; see also *Forsher v. Bugliosi* (1980) 26 Cal.3d 792, 805-806 ("In determining the defamatory nature of written material, the fact that some person might, with extra, sensitive perception, understand such a meaning cannot compel this court to establish liability at so low a threshold. Rather, the test . . . is whether by a reasonable implication a defamatory meaning may be found in the communication"); *Rudnick v. McMillan* (1994) 25 Cal.App.4th 1183, 1192 (whether a statement is opinion determined by using "natural and popular construction").

[15] *Grillo v. Smith* (1983) 144 Cal.App.3d 868, 874.

[16] *Copp, supra,* 45 Cal.App.4th at p. 837.

[17] *Moyer v. Amador Valley Joint Union High School Dist.* (1990) 225 Cal.App.3d 720, 725.

[18] *Jackson v. Paramount Pictures Corp.* (1998) 68 Cal.App.4th 10, 30.

[19] *Baker v. Los Angeles Herald Examiner* (1986) 42 Cal.3d 254, 260, cert. den. (1987) 479 U.S. 1032.

was made with actual malice. Actual malice is a knowing or reckless disregard for the truth.[20] A public figure is one who voluntarily injects himself into a public controversy, and attempts to influence the resolution of the issues involved.[21] Whether Plaintiff is a public figure is a question of law for the Court to decide.[22]

1. The statements on which Plaintiff bases his libel claim are not defamatory

The Complaint identifies five separate portions of the article that Plaintiff considers defamatory. For reasons that we now explain, none of them satisfy the definition of libel:

> **Mr. Cota then jumped into a lengthy condemnation of McCarthyism and loyalty oaths, the passion of his tone indicating that this topic held a good deal of personal relevance to him.**

According to Plaintiff, this passage implies that he "was passionately against subscribing to an oath of allegiance to our constitution." (Complaint, p. 6:23-25.) The words of the passage do not support Plaintiff's "strained" interpretation. The only factual statements are a recitation of what Plaintiff said, and a characterization of his tone. Plaintiff does not claim that those statements are false.

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[20] *Copp, supra,* 45 Cal.App.4th at p. 846.

[21] *Reader's Digest Assn. v. Superior Court* (1984) 37 Cal.3d 244, 254, cert. den. (1986) 478 U.S. 1009; *Copp, supra,* 45 Cal.App.4th at pp. 845-846.

[22] *Copp, supra,* 45 Cal.App.4th at p. 845; *Rudnick, supra,* 25 Cal.App.4th at p. 1190.

Simonton then goes on to state his opinion, drawn from those facts, that the topics had "personal relevance" for Plaintiff. (Simonton Declaration, ¶ 28.) The article does not state or imply that Plaintiff was opposed to oaths of allegiance. The balance of the article makes clear that the "personal relevance" grew out of Plaintiff's confrontation with Dean Coffman, not any opposition to loyalty oaths.

> **Reading through these clippings, I began to see another side to Alex Cota; the bitter, determined cynicism of a man who genuinely feels that he has been screwed by the system.**

Plaintiff claims that this sentence "is untrue and libelous on its face." However, this is not a statement of fact, but simply Simonton's opinion. The facts on which he based that opinion are fully disclosed in the article. (Simonton Declaration, ¶ 26.) The sentence does not imply any additional statements of fact about Plaintiff. The sentence is not defamatory just because Simonton may have characterized Plaintiff's state of mind in terms that Plaintiff found unflattering. "Rhetorical hyperbole and vigorous epithets are not defamatory."[23]

> **"My knees were shaking," he remembered. "But I had to say something." Cota rose to his feet and asked Coffman if he was afraid of Joe McCarthy.**

Plaintiff alleges that this passage is "false and libelous," because "it would have been absurd and illogical for plaintiff to inquire whether the Dean was afraid of McCarthy." (Complaint, pp. 8-9.) Initially, Plaintiff must

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[23] *Polydoros v. Twentieth Century Fox Film Corp.* (1997) 67 Cal.App.4th 318, 326-327, review dism. (Oct. 14, 1998).

establish by admissible evidence that the statement is false. Simonton recalls that Plaintiff said what he reported in the article. (Simonton Declaration, ¶¶ 5, 27.)

Even if Plaintiff could prove that the statement is false, he could not establish that it demeans or injures him. There is no reason that making such a statement would damage Plaintiff's reputation. Indeed, a reasonable person would applaud the act attributed to Plaintiff.

> **So, it had all boiled down to that: a massive McCarthyist conspiracy against Mr. Cota. I guess great the great thing about conspiracy theories is that they are tautological; once you accept the thesis, any lack of evidence (or the existence of any contrary evidence) only helps *prove* the conspiracy. But while that type of proof might suffice for an Oliver Stone screenplay, it isn't the stuff of good investigative journalism.**

Plaintiff alleges that his claims "are not properly thus characterized." (Complaint, p. 9:16-19.) However, his disagreement with Simonton's characterization does not make the statement defamatory. It is not a statement of fact. It is Simonton's opinion about the information that Plaintiff gave him. There is nothing defamatory about allegedly "denigrat[ing] plaintiff's judgment and the reasonableness of his position." The article does not even state that Plaintiff's account was incorrect. Indeed, it concludes by stating that "[w]e will never know" the truth about Plaintiff's charges.

> **We will never know whether Dean Coffman sabotaged Alex Cota's Torts exam; any evidence of that has long been swept from the fireplace of a man who died many years ago.**

> **And we will never know whether in burning that exam, Coffman intended to destroy the evidence of some personal vendetta against Cota.**

Plaintiff alleges that this passage is "libelous and untrue." (Complaint, p. 10:4-8.) However, the passage is not a statement of fact. It sums up the evidence from Simonton's point of view. Based on what Plaintiff told him, and the other information that he had, Simonton could not decide what the truth was. (Simonton Declaration, ¶ 24.) He was entitled to his opinion, just as Plaintiff was entitled to his. The words that follow the passage quoted in the Complaint, and conclude the article, demonstrate the evenhandedness that Simonton employed in presenting Plaintiff's story:

> We do know, however, that Alex Cota is a good man, a man who served his country in World War II, a man who helps run the nonprofit Eastside-Westside Concerned Citizens Committee, and a man who sincerely wants a law degree so that he may better help those in need. We also know that Joe McCarthy and his adherents unfairly treated many American Citizens because of their supposedly "un-American" political views. Based on what we *know*, however, we cannot say that J. Alex Cota was one of them.

(Complaint, Ex. A, p.4.)

2. Plaintiff cannot prove actual malice

Even if Plaintiff could prove that some portion of the article was defamatory, he still could not demonstrate a

probability of success on his cause of action. That is because he is a public figure who must prove that Defendants acted with actual malice in writing and publishing the article. He cannot do so.

Plaintiff is a public figure because he has continuously sought public attention in connection with his charges against Dean Coffman and his attempts to gain readmission to the Law School. He had been involved in an editorial that appeared in the October 1980 issue of *The Docket*, which had described his allegations, and called for Plaintiff's reinstatement. (Simonton Declaration, ¶ 11.) He initiated the contact with *The Docket* that led to the article that is the subject of this lawsuit. (Simonton Declaration, ¶¶ 3, 10.) He asked Simonton to circulate a petition to the student body calling for his reinstatement. (Simonton Declaration, ¶ 23.) Plaintiff distributed a flyer, which discussed the matters in the article and incorporated newspaper clippings that he had collected. (Simonton Declaration, ¶ 32.) There can be no doubt that Plaintiff is a public figure.

Because he is a public figure, Plaintiff must prove actual malice, that is, that Defendants published the article with knowing or reckless disregard for the truth. However, the Simonton Declaration and the article itself demonstrate the absence of actual malice. Simonton took the information that Plaintiff gave him, and wrote a story about it. He attempted in good faith to tell the truth as he saw it. (Simonton Declaration, ¶ 25.) He was careful to distinguish what was "known" through documentary evidence, and what could only be inferred from the available information. There was nothing that Plaintiff, or anyone else, told him that should have alerted him to any false

statements in the article. Simonton should be complimented for his evenhanded treatment of Plaintiff's story, not made the subject of a libel lawsuit.

D. Defendants are entitled to their attorney's fees and costs

Section 425.16, subdivision (c) provides that "a prevailing defendant on a special motion to strike *shall* be entitled to recover his or her attorney's fees and costs" (emphasis supplied). The award is a matter of right, and cannot be overcome by a plaintiff's public policy arguments.[24] Defendants will submit a full accounting of their fees and costs with their reply papers.

IV. CONCLUSION

For the reasons stated above, the Court should grant Defendants' motion to strike Plaintiff's complaint, direct entry of judgment for Defendants, and award Defendants their attorney's fees and costs.

DATED: September 3, 1999

GUTIERREZ, PRECIADO &
HOUSE, LLP

By: _____
Calvin House
Attorneys for Defendants
DAVID SIMONTON and REGENTS OF
THE UNIVERSITY OF CALIFORNIA

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[24] *Braun, supra,* 52 Cal.App.4th at p. 1052.

DECLARATION OF DAVID SIMONTON

I, David R. Simonton, declare as follows:

1. I am an attorney at law, duly licensed to practice before all Courts in the State of California. Except as otherwise stated, I have personal knowledge of the facts stated herein.

2. From approximately January of 1997 until May of 1998, I was a co-Editor-in-Chief of *The Docket*, the student newspaper for the UCLA Law School. During my tenure as Editor-in-Chief, I wrote many articles for publication in the newspaper.

3. Plaintiff telephoned *The Docket*'s office sometime in the early Spring of 1998. My co-Editor-in-Chief, Armen Martin, answered the telephone and began speaking with the caller. In his conversation, I overheard Mr. Martin mention the topic of loyalty oaths. As I had recently read an article in *The Daily Bruin* concerning the use of faculty loyalty oaths at UCLA in the 1950's, I volunteered to speak with the caller. Prior to this time, I had never spoken with or heard of Plaintiff.

4. In our conversation, Plaintiff expressed a profound disapproval of McCarthyism in general and loyalty oaths in particular. From his tone, I sensed that this topic held some personal relevance to him. At the time, in fact, I thought that Plaintiff might have been a faculty member at UCLA who had been forced to sign a loyalty oath.

5. During our conversation, however, Plaintiff clarified that he had actually been a student at the Law School in the early 1950's. Specifically, Plaintiff stated that he

had been a student in a Torts class taught by Dale Coffman, then the Dean of the Law School. According to Plaintiff, Dean Coffman was a McCarthyist who had publicly disagreed with Plaintiff's political viewpoints in class. Plaintiff told me that he had been scared to voice an objection to Coffman. In particular, he stated that his knees were shaking, but that he had to say something. Thus, Plaintiff said that he rose to his feet and asked Coffman if he was afraid of Joe McCarthy.

6. Plaintiff claimed that, as a result of their political divergence. Coffman had intentionally and wrongfully downgraded his Torts final. According to Plaintiff, this caused his average to fall below the minimum required to continue as a student on a probationary basis at the Law School (63). Plaintiff stated that he had visited Coffman in an attempt to review the scoring of his final, but that Coffman refused to review the test with him.

7. During our conversation, Plaintiff informed me that he would have been able to continue his studies at the Law School had he completed classes in the Law School's summer session and raised his average over the minimum cut-off. However, Plaintiff claimed that Coffman intentionally precluded this possibility by (a) sending out his grades late, and (b) sending him two letters containing conflicting information regarding his status at the Law School.

8. In addition, Plaintiff detailed his attempts to regain admission, through both petitions to the Law School and even legal action. In this regard, Plaintiff stated that Coffman had burned his Torts exam prior to the hearing in a suit brought by Plaintiff against Coffman.

9. Plaintiff also informed me that he had been able to depose Coffman and several of his classmates at the Law School in connection with his suit against a local radio personality. According to Plaintiff, the transcripts from these depositions contained inaccuracies that would support his allegations.

10. Based on what Plaintiff had told me, I asked whether he would be amenable to coming in for a face-to-face interview. Plaintiff agreed to do so. When I inquired whether Plaintiff would like to have an article published in *The Docket* about his situation, Plaintiff responded in the affirmative. In addition, Plaintiff advised me that I might want to read an editorial article published in the October, 1980 issue of *The Docket* concerning his situation prior to the interview.

11. Shortly after my conversation with Plaintiff, I looked up the October. 1980 editorial to which he referred. This editorial called for the reinstatement of Plaintiff to the Law School. Accompanying the editorial was an article entitled " 'And Justice for All.' Except Alex Cota," which essentially repeated the allegations that Plaintiff had made in our telephone conversation.

12. Upon reading this article, it appeared to me that the author had failed to conduct any independent investigation into the veracity of Plaintiff's claims. Accordingly, I decided that it would be advisable to conduct interviews with members of the Law School faculty and administration that might have some knowledge about Plaintiff's situation.

13. In total, I interviewed three members of the Law School faculty and administration. All three of these

interviewees requested that their identities remain anonymous. None of the interviewees reported having personal knowledge of the events described by Plaintiff in his conversation with me.

14. Two of the people I interviewed had served on committees that reviewed Plaintiff's requests for readmittance. As I learned, the first committee had found that there was insufficient evidence to support Plaintiff's allegations, and the second committee found that there was no new evidence to justify reversing the earlier committee's decision. Accordingly, both committees declined to grant Plaintiff's request for readmittance.

15. One interviewee told me that Coffman was in fact a McCarthyist and an authoritarian. However, because this interviewee was not at the Law School during Coffman's deanship, I concluded that her impression could not have been based on personal knowledge.

16. I would have conducted additional interviews but for the fact that none of the then-current faculty or administration were at the Law School when Coffman was Dean or when Plaintiff was attending the Law School. As such, I did not feel that any more interviews would be useful.

17. Within a week of my telephone conversation with Plaintiff, *The Docket* received an envelope without a return address. This envelope contained many photocopied documents concerning Plaintiff, including photocopies of several items of correspondence between Plaintiff and University officials. I read all of these documents. From their content, I assumed that the envelope had been sent by Plaintiff.

18. Some of the documents enclosed in the envelope appeared to be photocopies of various newspaper articles concerning attorneys who had been professionally disciplined and/or criminally punished. Many of these photocopies contained handwritten notations in the margins. Some of these notations indicated that the attorneys discussed in the articles had graduated from the Law School, and further suggested that the Law School produces unethical attorneys.

19. At some time in the Spring of 1998, I conducted a personal interview of Plaintiff in a student lounge area outside the offices of *The Docket*. At that interview, Plaintiff brought with him the aforementioned deposition transcripts as well as other documents. This interview lasted approximately one-and-a-half to two hours.

20. During out interview, Plaintiff reviewed his documentary records with me. In particular, Plaintiff focused on the deposition transcripts. Plaintiff had noted and catalogued various discrepancies and alleged inaccuracies in the transcripts, which he explained to me.

21. In reviewing Plaintiff's records, I read a copy of Coffman's certified Answer to a Petition for Writ of Mandamus that Plaintiff had filed against Coffman. In that Answer, Coffman admitted that Plaintiff received a score of 63 on his Torts exam. Furthermore, the Answer stated that Plaintiff had received a score of 59 from Professor Perkins in Criminal Law, and a score of 57 from Professor Verrall in Real Property.

22. At our interview, I asked Plaintiff whether these were the actual grades that he had been given. Plaintiff indicated that they were. When I specifically inquired as

to the low scores given by Professors Perkins and Verrall, Plaintiff stated that they were Coffman's "henchmen," and that they had therefore downgraded Plaintiff's exams as well.

23. At the conclusion of our interview, Plaintiff asked me if I would be willing to circulate a petition among the student body calling for his reinstatement at the Law School. I declined, but informed Plaintiff that Peter Nguyen, then the President of the Law School's Student Bar Association, might be able to do so.

24. Based upon my review of Plaintiff's records, my conversations and interviews with him, the previous articles in *The Docket*, and my interviews of the Law School faculty and administration, I formed the opinion that the evidence was inconclusive as to whether Plaintiff was in fact unjustly excluded from the Law School. In part, I based my opinion on the following:

a) that Coffman gave Plaintiff a score on his final that would have allowed Plaintiff to continue as a student at the Law School on a probationary basis, to wit, 63.0;

b) that both Perkins and Verrall had given Plaintiff lower scores than had Coffman, which scores were below the average score needed to continue as a student at the Law School, to wit, 63.0;

c) that it seemed unlikely that Coffman, Perkins, and Verrall would have all secretly entered into an agreement to give Plaintiff low scores on his final exam with the intent to cause his exclusion from the Law School;

d) that the editorial and article in the October, 1980 issue of *The Docket* did not appear to be based on any independent investigation by the author, but rather appeared to merely restate Plaintiff's allegations;

e) that none of my interviews of the faculty and administration members revealed any information that would support Plaintiff's allegations, other than one interviewee's apparent hearsay statement that Coffman was a McCarthyist;

f) that the law school administration had undertaken two separate reviews of Plaintiff's allegations, and in both cases found that the evidence did not justify his readmittance;

g) that none of the then-current members of the faculty or administration were at the Law School when Coffman was Dean or when Plaintiff was attending the Law School;

h) that none of the discrepancies and inaccuracies that Plaintiff claimed to exist in the deposition transcripts were conclusive, and many appeared to be minor in nature;

i) that none of the other documentary evidence provided to me was conclusive; and

j) that the only copy of Plaintiff's Tort exam had been destroyed.

25. In the subject article, I expressed my personal opinion that the evidence was inconclusive as to whether Plaintiff was in fact unjustly excluded from the Law School. This opinion is reflected in several of the allegedly offending passages quoted in the Complaint.

(See Complaint, pp. 9:6-15, 9:24-10:3.) In stating my opinion in this regard, I did not intend to disparage or damage Plaintiff, imply that Plaintiff was irrational or lacked good sense, denigrate Plaintiff's judgment or reasonableness, hinder Plaintiff's ability to pursue a legal career or legal studies, or defend any previous actions by the Law School faulty [sic] or administration.

26. In the subject article, I also wrote that "I began to see another side to Alex Cota: the bitter, determined cynicism of a man who genuinely feels that he has been screwed by the system." This statement accurately and honestly expressed my personal opinion as to one aspect of Plaintiff's personality. In large part, I developed this opinion after reading the photocopied newspaper clippings that Plaintiff had sent *The Docket* concerning the misfortunes of certain Law School graduates, as well as the handwritten notations thereon. In particular, it seemed to me that Plaintiff was implying that these attorneys were unethical because the entire Law School administration is unethical, or that Plaintiff was charging the Law School with the ethical problems of its graduates, or perhaps both. My opinion of Plaintiff in this regard was further enforced by my personal interactions with him. In publishing this opinion in the article, I did not intend to disparage or damage Plaintiff, imply that Plaintiff was irrational or lacked good sense, denigrate Plaintiff's judgment or reasonableness, hinder Plaintiff's ability to pursue a legal career or legal studies, or defend any previous actions by the Law School faulty [sic] or administration.

27. In the subject article, I stated that during his confrontation with Coffman in class. Plaintiff "rose to his

feet and asked Coffman if he was afraid of Joe McCarthy." I included this statement in the article because, during our conversation. Plaintiff specifically stated that he had asked Coffman, "Aren't you afraid of Joe McCarthy?" As such, I felt that the article accurately reflected what Plaintiff had told me. In making this statement, I did not intend to state or otherwise imply that either Plaintiff or his question was absurd, illogical, disjointed or irrelevant. Nor did I intend to disparage or damage Plaintiff, imply that Plaintiff was irrational or lacked good sense, denigrate Plaintiff's judgment or reasonableness, hinder Plaintiff's ability to pursue a legal career or legal studies, or defend any previous actions by the Law School faulty [sic] or administration.

28. In the subject article, I stated that "*The Daily Bruin* had run a feature story on how during the McCarthy era, the University of California required its faculty to sign an oath pledging allegiance to the US Constitution," and that Plaintiff had passionately condemned "loyalty oaths." In making these statements, I did not intend to imply that Plaintiff was not a supporter of the United States and/or the California Constitutions and their principles, or that Plaintiff objected to those principles. Nor did I intend to disparage or damage Plaintiff, imply that Plaintiff was irrational or lacked good sense, denigrate Plaintiff's judgment or reasonableness, hinder Plaintiff's ability to pursue a legal career or legal studies, or defend any previous actions by the Law School faulty [sic] or administration.

29. Rather, I stated that "*The Daily Bruin* had run a feature story on how . . . the University of California required its faculty to sign an oath pledging allegiance to

the US Constitution" because I honestly believed that was what the feature story had said, and because I honestly believed that the faculty loyalty oath involved such a pledge.

30. Moreover, in an article published in the May, 1998 issue of *The Docket*. Mr. Martin wrote a correction as to the nature of the faculty loyalty oath. Specifically, Mr. Martin's article stated:

> What was Cota's gripe about the article? The story inadvertently stated that the UC faculty at the time of Cota were required to pledge allegiance to the U.S. Constitution (they actually required a "negative disclaimer" that professors were not Communists). As a result of this **minor misstatement**, Cota alleged "ignorance" on the part of *The Docket* and presumably some sort of malice, slander, or defamation in order to pursue legal action.

A true and correct copy of Mr. Martin's article is attached hereto as Exhibit "A."

31. After the publication of the subject article, Plaintiff telephoned me at my residence to discuss the possibility of obtaining a correction or retraction. During this lengthy conversation, I informed Plaintiff that, although I sympathized with his situation. I stood by the opinions and factual representations contained in my article. In particular, I stressed to Plaintiff that I felt that there was insufficient evidence to conclude that he was in fact unfairly excluded from the Law School.

32. Sometime after the publication of the subject article, Plaintiff distributed a typewritten flyer by placing copies thereof in student lockers and in the hallways of

the law school. This flyer attacked my article as being "unjust and distorted" and "replete with inaccuracies," and described me as being ignorant, arrogant, and "vicious," and as having "overlooked the truth." On the reverse side of this flyer, Plaintiff had created a collage-like image of various newspaper clippings, some of which were the same clippings that had been enclosed in the envelope that was sent to *The Docket*. A true and correct copy of this flyer is attached hereto as Exhibit "B."

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that I executed this Declaration on September 2, 1999 at Fresno, California.

/s/ David R. Simonton
David R. Simonton

EXHIBIT A

Why Student Activism and Journalism Must Be Separate and Distinct

By Armen Martin

Editor-in-Chief

[Picture Omitted In Printing]

I can no longer even pick up *The Daily Bruin*. What passes as "journalism" on the front page of *The Bruin* makes one wonder whether its editors view themselves as journalists covering the politics on campus or as student activists promoting fashionable causes. Each story reads like a struggle between good and evil. Ten activists

will be quoted, each saying the exact same thing without any attempt to get the opinion of the administration or the source of "evil."

While I am sure each of these student "journalists" sees himself as a latter-day Bob Woodward, what these students fail to see is that it is just as wrong to blindly trumpet the propaganda of the student activists while ignoring the other side.

As an editor of *The Docket*, I have had a personal opportunity to witness what happens when political activists assume that the school newspaper is nothing more than an extension of their activities, a way to trumpet their causes.

Anyone who read "The Strange Tale of J. Alex Cota" in the April issue of *The Docket* must have wondered how *The Docket* heard about this former UCLAW student who claimed he had been expelled from the school in the 1950's by a McCarthyist dean who disagreed with his views. As mentioned in the article, it was Cota who approached *The Docket* with his story. Cota's custom is to contact the editors of *The Docket* every so often and ask them to print an article about his struggle for re-admission to UCLAW. Fortunately for Cota, past editors have been just as eager to help Cota under the banner of injustice as they were unwilling to actually investigate Cota's claims. With articles entitled "And Justice For All . . . Except Alex Cota" and "Reinstate Cota," these "journalists" typified the journalist who views himself as activist. They recited all of Cota's claims without so much as asking the tough questions. "If you claim that the dean sabotaged your exam in order to kick you out, how do

you explain the other two failing grades you had that same semester?"

Cota went to the well one too many times. This time, instead of finding a budding student activist, Cota was confronted with the tough questions. Once each was answered it became apparent that his claims were not only fantastic, but also unsubstantiated. After Cota read the story, he was shocked to discover that it came to the conclusion that there was not enough evidence to show that Cota had been unfairly expelled. At first, he demanded a retraction. When he was told that a retraction would not be printed, he threatened *The Docket* and the law school with legal action.

What was Cota's gripe about the article? The story inadvertently stated that UC faculty at the time of Cota were required to pledge allegiance to the U.S. Constitution [they actually required a "negative disclaimer" that the professors were not Communists). As a result of this minor misstatement, Cota alleged "ignorance" on the part of *The Docket* and presumably some sort of malice, slander, or defamation in order to pursue legal action.

Another example of an activist who does not understand the difference between journalism and activism is the outgoing SBA President, Peter Nguyen. *The Docket's* first contact with Nguyen was when showed up to the first *Docket* meeting of the year and insisted that one of the editors talk to him in the hall way during the meeting. He complained that he was "disappointed" that *The Docket* did not feature coverage of the SBA (read: "HIMSELF") in the first issue. His arrogance did not go unnoticed.

Nguyen was criticized (mostly through parody), by editors of *The Docket* in the next two issues. Instead of laughing it off like any savvy politician would, Nguyen allowed the criticism to get to him personally. When asked to sign a form that would allow *The Docket's* journalists to compete in an ABA-sponsored student journalism competition, Nguyen declined stating simply "I would not be comfortable [signing]." Even though the entry form had been signed by the Dean of the school, the ABA student representative and others (as required by the ABA), Nguyen attempted to deny the writers of *The Docket* and the school the change to compete because of a personal vendetta with *The Docket's* editors.

Nguyen's failure to sign the form resulted from his disbelief that *The Docket* was not willing to blindly publicize his numerous initiatives. Had *The Docket* published more than one issue in the Fall, it would have thoroughly covered Nguyen's proposed resolution denouncing the Regent's decision to end race and gender based preferences in UC admissions. However, it would not have blindly trumpeted Nguyen's achievements. *The Docket* would have given as much time to Nguyen's detractors as to Nguyen himself. This constitutes fair journalism.

It is naive to assume that journalists can always be objective. Journalists are like anyone else, they have political opinions and personal beliefs. The proper avenue to express such opinions is through the editorial pages of a newspaper. The problem with journalist activists is that they choose to write their opinions pieces in the form of news. They refuse to cover all sides of an issue, instead concentrating on publicizing only those views they agree

with. This can properly be called activism, but not journalism.

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Attorneys for Plaintiff
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IN THE SUPERIOR COURT OF
THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

ALEX COTA, Plaintiff, v. DAVID SIMONTON, THE DOCKET, an unincorporated association, SUSAN WESTERBERG-PRAGER, THE BOARD OF REGENTS OF THE UNIVERSITY OF CALIFORNIA, and DOES 1 to 20, Defendants.	No. BC208017 PLAINTIFF'S OPPOSITION TO MOTION TO STRIKE DATE: 9/28/99 TIME: 8:30 A.M. DEPT.: 34

INTRODUCTION

Plaintiff submits that he shows herein that there is a real probability that he will prevail in the case.

The Motion to Strike claims most inaccurately and slurringly what plaintiff said and seriously misreports much other material as well. The opinions are very largely not about what plaintiff told Simonton at all, but on "facts" which Simonton unfortunately misstates. And, defendants actually admit that they have misstated facts which relate to plaintiff's core beliefs; but they hope to escape by calling this "minor" and plaintiff's damage only a "gripe."

Despite the assertions of defendants, plaintiff is surely not a public figure. Even if he had been, there is a good deal of evidence showing that Simonton was acting with malice or sufficiently wilful [sic] disregard of truth to create liability.

Meanwhile, plaintiff respectfully suggests that an appropriate interim disposition of this Motion to Strike would be to put over final determination and permit discovery focusing on issues raised by the Motion.

SLAPP suits are generally, it is said,

> "Meritless suits brought by large private interests to deter common citizens from exercising their political or legal rights, or to punish them for doing so." *Wilcox vs. Superior Court* (1994) 27 C.A.4 809, 33 C.R.2 446.

That is true, but in the present case the plaintiff is not attempting to prevent anyone from exercising any rights.

He is only seeking to protect his own right to go to law school, and to respond to The Docket's attacks on him.

He has the right to freedom of speech under the First and Fourteenth Amendments to the United States Constitution, and it must not be denied to him.

This not a SLAPP suit at all. The effort to fit it into that mold is [sic] itself is oppressive. An ordinary citizen, frustrated in his efforts to attend and continue at a public law school, has been defamed by a publication of that school. Damaged, he seeks redress for the defamation. The powerful Regents, not content with dealing with the matter on its merits, seek to punish him for daring to obtain a remedy at all. That is not a SLAPP situation.

Here plaintiff is *not* a large private interest.

And the suit is *not* basically against common citizens.

It is *not* a suit to deter others from exercising their common judicial or legal rights, nor to punish them for doing so.

This is the exact *opposite* of a SLAPP suit. Here it is the defendants, seeking attorneys' fees as well as dismissal, who have the goal of punishing plaintiff for daring to defend himself from their defamation.

1. THIS IS NOT A SLAPP SUIT.

SLAPP cases are something other than what is present here. To seek to fit defendants' position in this lawsuit into the SLAPP model is to seek a real miscarriage of justice. It must not be permitted.

Defendants wrongly urge, under Code of Civil Procedure Section 425.16(e)(2) that this case involves a written or oral statement made before a legislative, executive or judicial proceding [sic], or other official proceding [sic] authorized by law.

Nothing whatever is pending, nor has it been, for a good many years. And the private ad hoc hearing which should have been furnished was not, in fact, furnished, nor have defendants shown that it was furnished.

Defendants allege that the performance of the Dean is a matter of public interest. But he is not the Dean, and has not been the Dean for a period of a good many years – at least twenty years. This is shown in the Declaration of Plaintiff at paragraph 42.

It is logically pretty hard to qualify this case as involving a matter of public interest simply by arguing that the offending article mentions McCarthyism, and that McCarthyism is of public interest.

That is a long stretch. Should throwing in a mention of a subject that once was of interest thus enable the defendants to urge that any lawsuit has magically become a SLAPP suit and so, presumptively, be thrown out, with attorneys' fees to defendants as well?

We do not believe that this is what the statute, by its words, or by fair inference, is meant to do.

* * *

There is surely the statutory probability that plaintiff will prevail. The prerequisites exist.

There have been false and unprivileged statements of fact which expose plaintiff to hatred, ridicule, or contempt, and have a tendency to injure him in his desired occupation.

Thus, defendants appear actually to admit that the article misstates the fact of plaintiff's views of the constitutional oath of allegiance.

And the article seeks to make a dunce of plaintiff by twisting what was said so that plaintiff rather than the Dean is supposed to have asked about the other's fears of McCarthy.

And basically plaintiff is accused of believing that all is a massive McCarthyite conspiracy against plaintiff; and further that non-proof, or even proof of the contrary, also helps prove the conspiracy. This is basically a kind of accusation that plaintiff is not really in his right and proper mind.

As elsewhere dicussed [sic], plaintiff is not a public figure. If he were, there would still be a substantial showing of actual malice.

2. THE SIMONTON DECLARATION SHOWS SERIOUS DEFICIENCIES.

The reliability of Simonton, and of his statements in his Declaration, are open to considerable question, and do not help to establish this as a SLAPP suit at all. Let us mention a few instances.

– He seeks to bolster his position as to the reliability of Coffman and Coffman's not being a McCarthyite by

citing anonymous informants. Simonton says that in testing the veracity of plaintiff's claims, he interviewed three members of the law school faculty and administration. (Simonton Declaration, Motion, p. 13, lines 8-9). Yet, Simonton does not wish to and does not reveal the identity of any of these people, because they requested anonymity. Still, he purports to rely on their evidence anyhow and in a conclusory style. To call such evidence hearsay is perhaps to over-dignify it. Supposedly the three anonymous informants said, vaguely, that they did not have knowledge of the events described by plaintiff.

– One of his informants did tell him that Coffman "was in fact a McCarthyist and an authoritarian." (Simonton Declaration, Motion, p. 13, lines 17-18). An interesting admission. . . . But Simonton goes on immediately to say that he concluded that this informant's impression could not have been based on personal knowledge (and therefore, one supposes, Simonton graded this view down to zero). How Simonton knew that the writer did not have personal knowledge is left unclear.

– Simonton presented to the court, as Exhibit B of his Declaration, what he says is a "true and correct copy" of plaintiff's flyer. Unfortunately, the copy Simonton presented, in fact, omits one page of the two-page flyer. Simonton grandly concludes that it "appears" to him (Simonton Declaration, Motion, p. 13, lines 4-5) that the author of the article failed to conduct an independent investigation. So, presumably, once again, this too was downgraded to zero, because it favored plaintiff's position and cause and concluded that plaintiff was a worthy person who should be readmitted to the school.

– Simonton says rather questionably that one reason he could not decide whether the plaintiff was excluded unjustly from the law school was that "the only copy [sic] plaintiff's tort examine [sic] had been destroyed" (Simonton Declaration, Motion, paragraph 24j). Had the destruction been a neutral and orderly routine disposition to eliminate clutter, that could be a reasonable approach. But Simonton, with what seems a degree of bias, omits to say that the evidence showed that the examination had been destroyed by Coffman personally at a time when he knew that the existence of the examine was highly significant in connection with the plaintiff's claim of injustice.

These are examples of the very considerable unreliability of the Simonton Declaration. That Declaration was intended to show that the plaintiff cannot show probability of success for his libel action.

However, it would appear that the Simonton Declaration has weaknesses that instead suport [sic] the plaintiff in a number of ways.

3. PLAINTIFF HAS INDEED BEEN SERIOUSLY LIBELED.

Defendants seek to rely as a partial defense on the concept that opinions interpreting facts are not libelous, and have cite [sic] for example *Copp vs. Paxton* (1996) 45 C.A.4 829. But not everything claimed to be simply opinion as to facts is indeed such.

The United States Supreme Court has made clear that a false assertion of fact could be couched nominally in terms of opinion. *Milkovich vs. Lorain Journal Co.* (1990)

___ U.S. ___ (110 S.Ct. Rptr. 2695, 111 L.Ed.2d 1). That position has applicability in the present case, where an effort is being made by defendants to hide behind the mask of supposed opinions.

And what if the opinions relate to facts that are not really facts at all? As, that plaintiff condemns an oath of allegiance; that Dean Coffman destroyed the important torts examines [sic] only as a matter of routine; that plaintiff asked that McCarthy-favoring Coffman if Coffman was afraid of McCarthy; that plaintiff believed that all his problems arose from a massive McCarthyite conspiracy?

These "facts" as well as others are not facts at all, though Simonton claims that they are facts. And Simonton goes on to base his attacks on plaintiff and his scoffing at plaintiff on these *non*-facts which are actually contrary to fact.

Thus, in reality, plaintiff actually favors and supports the constitutional oath, rather than condemning it.

In reality, Dean Coffman did not destroy the examine [sic] as a matter of mere office routine, and did so at a time when he knew his grading was coming into serious question.

In truth and reality, the nervous but game plaintiff did not ask if Coffman was afraid of McCarthy. It would have been absurd to fear his favorite, his idol. Basing his opinions on wild unreality, Simonton does not spare himself from action against him simply be saying "Oh, I was only giving my opinion based on facts." These are not

facts at all; and Simonton cannot exempt himself by serious misstatements of fact.

Simonton is not stating the facts correctly, and of course the opinions became Simonton putting the words of Coffman in the mouth of plaintiff, thus seeking to make plaintiff into an illogical fool. (Motion, pg. 7, lines 4-5).

Defendants urge that plaintiff "must establish by admissible evidence that the statement is false" (Motion, pg. 7, lines 8-9). Very well; and plaintiff is well-prepared to do that, has put in his Declaration a sketch of his testimony in this regard (Cota Declaration, paragraph 15).

Ordinary common sense, as well as sound legal precept, holds that when you destroy evidence that could be against you, it will be presumed that that evidence would indeed have been adverse to your position.

Yet, Simonton urges that destruction keeps us from proving that anything Coffman did in regard to the examination was wrong or unjustified.

Yet in his article he says that we will never know whether Dean Coffman sabotaged plaintiff's tort exam, and that any evidence of this has been swept from the fireplace of a man who died many years ago (Complaint, Exhibit 1, last page, last column).

But evidence is not swept away. For example, even if the test had been burned instead of being placed in the waste paper basket, the destruction of the exam when its grading was known to be in question is indeed itself evidence of the "sabotage" that took place.

4. PLAINTIFF IS NOT A PUBLIC FIGURE.

What makes it just or correct to call plaintiff a public figure, as defendants would have it?

Very little. Her certainly is not a person of intense fame and his modest efforts to return to law school and became an attorney would not seem to qualify him as a limited public figure either.

When we compare with, let us say, Synanon and Charles Dederich, we see that plaintiff is not a public figure. In *Reader's Digest Assn. vs. Superior Court* (1984) 137 C. 3d 244), a libel action went against plaintiffs, where they were held to be public figures. But in that case, the Synanon foundation had sent out at least 960 letters to the media in 1978 arguing its case – and these went to all the major TV networks, affiliates, as well as hundreds of newspapers. *Supra*, 37 C. 3d 244, 256. Synanon got 11,136 clips of articles about them during 1978 and 1979. According to the opinion at page 256, "they enjoyed remarkable acces [sic] to the media." No comparable statements can be made here as to plaintiff, either as to the effort or success of publicity efforts. The difference is conspicuous and there is simply not enough to show that the plaintiff here was even a limited-purpose public figure.

A. Even if plaintiff had been a public figure, there is evidence of any [sic] required malice.

It is certainly hard to regard the plaintiff as a public figure. However, even if he were so regarded, there is

certainly ample evidence that there is a strong probability of plaintiff's establishing malice.

Examples are:

– The downplaying of evidence that Dean Coffman was indeed a McCarthyite and an authoritarian. One of his own anonymous informants admittedly told Simonton this, but Simonton chose to throw away that evidence. (Simonton Declaration, Motion, paragraph 15). And plaintiff recounted his own experiences to show Coffman was a McCarthyite and authoritarian. But Simonton disregards that also.

– Quite amazingly, Simonton professes in his article that nothing about the exam could be proven because, he said, Coffman burned it. (Complaint, Exhibit 1, last page, last column).

And, even if opinions are not actionable in themselves, they could certainly show that Simonton was very ill-disposed against plaintiff. For example, his comparison of Oliver Stone with plaintiff as a conspiracy theorist is illustrative. Simonton talks loftily of a "massive conspiracy theory" and of the lack of proof itself constituting proof (apparently, supposedly, in the mind of plaintiff). (Simonton Declaration, Motion, pg. 7, lines 16-21).

This is a bit shallow, but it shows Simonton's antagonistic attitude toward plaintiff.

5. PLAINTIFF REQUESTS DISCOVERY BEFORE FINAL RULING.

Plaintiff asks that the final determination of defendants' Motion to Strike be put over and continued, and that meanwhile plaintiff be granted fair and appropriate opportunity for discovery.

The Motion to Strike has been brought very recently, and naturally plaintiff has not had the opportunity to conduct discovery. The statute provides for the possibility of discovery before the Motion is decided (Code of Civil Procedure Section 425.16(f)).

That seems very appropriate and required for proper disposition of the Motion. And plaintiff asks that this relief be granted. This will provide the Court with information on malice, the relationship of the defendants, and other significant matters, including the circumstances under which the challenged article was prepared.

CONCLUSION

The appropriate interim disposition of the Motion to Strike is to afford the plaintiff reasonable opportunity for discovery.

Even if such discovery were not granted, it is submitted that the Motion to Strike should be denied. This [sic] not a SLAPP situation.

DATED: September 17, 1999

STEINBERG & STEINBERG
Attorneys for Plaintiff ALEX COTA

By: /s/ Larry Steinberg
LAWRENCE WILLIAM
STEINBERG

DECLARATION OF ALEX COTA IN OPPOSITION TO MOTION TO STRIKE

I, ALEX COTA, say and declare:

1. I am the plaintiff in this law suit.

2. I can and would testify competently to the matters stated in this declaration.

3. Defendant Simonton urges that I condemned the signing of an oath of allegiance to the United States Constitution. Simonton urges in his article that "I jumped into a lengthy condemnation of McCarthyism and of loyalty oaths." (Complaint, Exhibit 1, Page 1, Column 2).

4. It is true that I certainly did not favor the reckless smearing characteristic of McCarthyism, but it is absolutely untrue and seriously libelous that I condemned or would ever condemn the signing of an oath of allegiance to the United States Constitution. I have always been prepared to sign such an oath.

5. The article indicates that I was passionately against subscribing to an oath of allegiance to our constitution. This would be damaging to anyone, and especially

to one who desired to and desires to follow the profession of attorney at law.

6. In truth and in fact, in the 1950's and today, I am attached to the United States and California constitutions and to their principles. During the 1950's period in question, the loyalty oath required was not a simple statement of allegiance to the United States and California constitutions such as is provided by the attorney's oath in the Business and Professions Code, Section 6067.

7. The oath then required involved also a very different and negative pledge of non-membership in communist organizations and non-advocacy of overthrow of the government. These additional requirements have long since ceased to be demanded in the oath of office. Defendants knew that I had no objection to the simple standard oath of allegiance to the United States Constitution and its principles. I condemned and condemn now the demeaning and now long-abandoned additional negative provisions abjuring membership in various organizations and various supposed beliefs.

8. Still the Article urged falsely and libelously that I objected to the principles of the United States and California constitutions.

9. Simonton, in his declaration, states at Pages 17-18, that Mr. Martin wrote in the August 1998 edition of the Docket, a "correction" as to the nature of the faculty loyalty oath.

10. I never read that article, nor knew of it, until it was presented as an exhibit to the declaration of Simonton on the motion to strike herein. I was never, before the

motion to strike, informed by the defendants, nor sent a copy of the Martin article. But it is not a correction. The article itself was somewhat insulting, and did not even seek to indicate that I had never refused to sign or take an oath of allegiance to the constitution.

11. Had I known of the article by Mr. Martin, I would have demanded in May 1998, that a true and real correction or retraction be published by the defendants.

12. I do not regard what was wrongly said as a "minor misstatement" as the Martin article indicates. It is not so much a matter of what the faculty was required to swear to, but of what my attitude and my attachment to the Constitution was. There was no retraction at all.

13. Simonton's article states (Complaint, Exhibit 13, Page 1, Column 3):

> "Cota explained that Coffman, the first dean of UCLA Law School, was the professor of his first-year Torts class. One day, the National Lawyers Guild, a politically liberal association of attorneys, distributed leaflets to the student body promoting a national tour."

I told Simonton that I had never heard of the National Lawyers Guild prior to the organization sending letters (not leaflets) to all first-year law students, inviting them on a tour of the local courts (not a national tour).

14. I specifically explained to Simonton that I had never heard of the NLG. Simonton's characterization (which was not mine) of the National Lawyers Guild as a liberal association is something former Dean L. Dale Coffman, a supporter of Joe McCarthy, might use as a derogatory label.

15. On page 6 of his article, Simonton incorrectly and falsely said, "Cota rose to his feet and asked Coffman if he was afraid of Joe McCarthy." I never told that to Simonton, and of course it was not true. In questioning Dean Coffman's support of McCarthy in the Torts class, I never rose to my feet to ask if [sic] Coffman if he was afraid of Joe McCarthy. It was Dean Coffman who later used this absurd illogical and untrue description of what I said in the torts class. Dean Coffman asked me if I was afraid of McCarthy. Simonton repeated what Dean Coffman stated in a deposition, Simonton was shown Coffman's deposition by the plaintiff who asked him to read it. Simonton was certainly not restating what I told him.

16. Though asked by me, the University and the Regents never investigated my case to determine what happened. No effort was made to preserve evidence (especially, my law exams which were wrongfully destroyed, thus obstructing justice). No witnesses were ever called by the University or Regents and classmates of Plaintiff were not called. As a result, Coffman always, but untruthfully denied that anything regarding Senator McCarthy was ever discussed in his torts class. Coffman falsely denied this in a verified answer in the mandamus matter, Cota v. Regents, L.A.S.C. No. 619053 which was shown to both Simonton and Dean Susan Westerberg-Prager, along with other matters.

17. After years of struggle, I was finally, in another proceeding, Cota v. UCLA, L.A.S.C. No. 79163, able to depose Dean Coffman who stated:

> Q. Do you ever recall having a discussion or making a statement to Mr. Cota in the classroom itself concerning the then Senator Joseph

> McCarthy? A. I recall one time Mr. Cota brought up Senator McCarthy and said, "Aren't you afraid of Senator McCarthy?" It had nothing to do with the legal problem we were discussing at the time, and my answer was, "No". (Exhibit 1 hereto, Page 9).

18. I had asked Simonton to read, along with many other items, the L. Dale Coffman deposition. Simonton used Coffman's false statements but attributed them to plaintiff. Simonton repeats this falsity of Coffman's in his article and his declaration before this court. Simonton was presented with both the verified Answer of Dean Coffman and Coffman's deposition, (as was, also, Dean Susan Westerberg-Prager, on an earlier occasion.).

19. Dean Coffman tried to deny that there was ever any political disagreement at all between him and me. Coffman in his verified Answer in the Cota v. Regents case, urged this until he was finally placed under deposition. He then admitted that I had asked him in class if he was afraid of Joe McCarthy, but that it had nothing to do with the legal matter being discussed in the torts class. In truth and in fact, Coffman initiated the discussion in class with McCarthyist statements attacking the National Lawyers Guild as "Liberals with a capital "L". Coffman spoke in terms of "guilt by association". I stated this sounded like McCarthysim. Coffman replied: "Senator McCarthy is the greatest living American", and he challenged the class to name anyone who had ever been wrongfully accused by McCarthy. I responded: "What about Secretary of State Dean Acheson?" This stumped Dean Coffman. All he could do was pace back and forth on the

podium and finally mutter: "Oh, he will get around to him yet."

20. I attempted to explain that I had followed the exploits of Senator McCarthy in the newpapers [sic]. This prompted an unfair rhetorical question from Coffman to me: "What newpapers [sic] have you been reading?" This brought laughter from some members of the class, and later many cat-calls down the hallway: "Hey, Cota, what newspapers have you been reading?" After this exchange in class, Dean Coffman later told me in a private conversation within weeks that I had better "conform" to his views or be "weeded" out of law school. I told Coffman that as an American citizen, I could not and would not, conform to his views. For my position, I had to endure many acts of derision, from cat-calls to being struck from behind with heavy law books; still I did not drop out of law school. But it was clear to me that I was placed in scholastic danger by my remonstrances against Dean Coffman's views.

21. After I had read the Simonton article, I telephoned him and demanded a retraction, particularly of the false charge that I condemned the oath of loyalty to the United States Constitution. I explained that this was painful and injurious to me. It seriously and unjustly reflected on me as an American citizen – and at that, one who sought to become an attorney. Attorneys were then and now, required to swear allegiance and loyalty to the United States Constitution. I have never hesitated in any way, to take or to sign an oath of allegiance and loyalty to the Constitution. I told Simonton this. He apologized profusely, but nonetheless refused to make a retraction.

22. He admits such refusal in his declaration at Paragraph 31.

23. Subsequently, being very concerned over admission to the school, I prepared a flyer and distributed it at the U.C.L.A. Law School. It was entitled: Ignorance and Arrogance Should not Add to Injustice. It contained my writing on one side. Simonton states in his declaration at Paragraph 32 that a "true and correct copy of this flyer is attached hereto as Exhibit B". This, to put it politely, is not true. Regrettably, Simonton has not placed before the court the other half of the flyer, the reverse side. Thereon appears, among other things, an editorial entitled "Reinstate Cota" from The Docket of September 10, 1998, which is now quoted:

> "The Docket notes with regret and embarrassment the shameful chapters of U.C.L.A. history; reflected in the article on Joseph Alex Cota. It is a story of lies, bigotry, and cruelty.
>
> "As a public school, U.C.L.A. has a tremendous responsibility to produce lawyers who will serve the greater public interest. The Docket is confident that the Administration will provide a forthright response to these serious charges and take immediate steps to restore Mr. Cota's student status. California needs such attorneys and U.C.L.A. needs to provide them."

The whole flyer is attached hereto as Exhibit 2.

24. Simonton incorrectly states, (. . . Plaintiff informed me that he would have been able to continue his studies at the law school had he completed classes in the law school summer session." I did not tell Simonton this at all. I pointed out that when I got the results on

August 4, 1952, I went to question the grading of examination papers by both Dean Coffman and Prof. Perkins. Both Coffman and Perkins were, on August 4, 1952, placed on immediate notice that the examination grades (Torts/Coffman and Criminal Law/Perkins) were held in question and that appeals to higher University authority and litigation were to be taken. I told Simonton that I was never able to get Prof. Harold Verrall to discuss his Property Law exam answers. Coffman spoke in his own behalf as well as for Professors Perkins and Verrall. Coffman stated in his Answer that he had destroyed exam papers within a six month period as did Prof. Perkins. At another time, in a [sic] another deposition, Coffman stated that the examinations were destroyed after a year. (Exhibit 3). At any rate they destroyed the exams knowing their grading was in serious question.

25. Simonton states that I told him Coffman had burned the exam. I told Simonton no such thing. Coffman states in his deposition that he destroyed the examination by placing it in the waste basket. (Exhibit 3). Still the wrongful destruction of evidence by both Coffman and Perkins was not only entirely unethical, but a clear obstruction of justice. Yet, Simonton, Prager, and Law School Administrations (University Administration included) have all treated this as something of no consequence.

26. On August 4, 1952, I was in Coffman's office for only one purpose; namely, to obtain an explanation of the grading of his examination. This evidence was placed before Simonton and defendant Prager. (Dean Prager in 1982). Dean Prager always had access to the evidence. I had absolutely no idea on the August 4, 1952 visit to

Dean Coffman's office, that I was going to be required to attend summer school.

27. In fact, the official law school bulletin specifically stated:

> "The courses in law in the summer session are open to members of the bar and to students who have satisfactorily completed their first year in law."

This requirement appeared in the bulletin of the following year also. (Exhibit 4).

28. Dean Coffman had deliberately sent two letters to me which were received on subsequent days. Both letters were written on July 31, 1952, almost one and a half months late. Evidence later showed my grades had been entered about mid June but Coffman deliberately waited until July 31, 1952 to write to me. The first summer session was over and the second had already begun, when on August 4, 1952, I was in Coffnman's [sic] office to ask about my exams.

29. Even then there was no mention made as to when the summer session would begin. Also, the letter contradicts an Official School Bulletin that only students who had satisfactorily completed their law courses and members of the bar could attend summer school.

30. I never received any notice about the start of summer session in the (at best) unclear letters from Dean Coffman. I was in Coffman's office on August 4, 1952, to ask for an explanation of the grading of his examination. I was unaware that the second summer session was

already beginning. But Coffman even then never said a word to me about summer session.

31. I received the first July 31st letter on Saturday August 2, 1952. The first letter stated that I had received a 62.7 grade and could not continue in school. (Exhibit 5). There is no mention of summer school. In this first letter it is important to note that 62.7 was only three-tenths of one percent from the grade of 63 which would have allowed me to remain in law school. Upon receiving this Saturday letter, I could only wait to go see Dean Coffman on Monday, August 4, 1952. Dean Coffman on August 4, 1952 did not and would not explain the grading of my exam. He later falsely stated in his answer that he and Prof. Perkins both explained the grading of my exams.

32. However, under deposition he admitted he had not explained the grading of my exam. Prof. Perkins also refused to explain. Both defendants Simonton and Prager had before them this evidence of non-explanations and of the deliberate destruction of the exams.

33. After seeing Coffman and Perkins on August 4, 1952, (neither of them uttered one word about summer session) I returned home to find the second letter of July 31, 1952 from Coffman. (Exhibit 6). This letter said I could go to summer session, but stated nothing about when summer sessions were to begin. In confusion, I returned to the law school only to find that the second summer session had already begun.

34. Contrary to what Simonton states, I received absolutely no real prior notice about summer session. Simonton states: " . . . This letter dated July 31, states that

Cota would be allowed to take classes in a six week summer session to try to raise his GPA above 63.0.

35. Moreover, I lost my Veterans' GI Bill educational benefits as a result of Coffman's unjust conduct. This was a matter of great importance.

36. Simonton, in his article states:

"Although it seemed a little odd that Coffman's office would send Cota two separate letters, both dated on the same day, it seemed even odder to attribute this apparent snafu to some invidious conspiracy against Mr. Cota."

37. Neither of the two letters of July 31, 1952 from Dean Coffman made any mention of when the summer session would begin. The first July 31 letter (Exhibit 5) stated:

> ". . . . your grade average of 62.7 on all the work undertaken is not satisfactory, and I am sorry to inform you that you are not eligible to return."

The second letter of July 31, (Exhibit 6) stated:

> "Although you are not eligible to enter the second academic year with your present average, you do have an opportunity to change that average by summer session work in this school."

38. But I had had no advance notice. Taken by surprise, I never did have the chance to go to summer school for several reasons. I couldn't get the books, which had been sold out. I would have had to make job arrangements, for I was dependent on my earnings and needed to try to help my family as well. Classes had already started.

39. Our grades had been entered into school records by mid-June. This was not a mere snafu, but a situation which I should have been given notice of in good time, rather than in August when it was too late.

40. My rights and opportunity to remain in school had been done in. But Simonton accepts this, and basically blames me for it.

41. Though I certainly have self-respect and seek to function as a good and decent member of society, I do not believe I can properly be classified as a person of great fame. And basically I was seeking to attain readmission to the law school under proper conditions. I do not believe that makes me a public figure even in the more limited sense.

42. I will add that Dean Coffman ceased to be the dean of the law school a good many years ago, at least 20 years ago.

I declare under penalty of perjury of the laws of the State of California that the foregoing is true and correct. Executed at the County of Los Angeles, State of California on September 17, 1999.

/s/ Alex Cota
ALEX COTA

SUPERIOR COURT OF THE
STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

ALEX COTA, Plaintiff, v. DAVID SIMONTON, et al., Defendants.	CASE NO. BC208017 ~~[PROPOSED]~~ JUDGMENT (FILED DEC 6 1999)

This action came on for a hearing on the special motion by defendants David Simonton, Susan Westerberg Prager and the Regents of the University of California to strike the complaint on September 28, 1999, in Department 34 of the Superior Court, the Hon. Judith Chirlin, presiding, plaintiff appearing by Lawrence Steinberg, and defendants appearing by Calvin House. After the hearing, the Court granted the special motion to strike.

[On Nov 18, 1999 the court denied Plaintiff's Motion for Reconsideration. JC]

It appearing by reason of said action that defendants are entitled to judgment against plaintiff,

NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that plaintiff take nothing from said defendants, and that said defendants recover from said plaintiff costs and disbursements in the amount of $590.00.

DATED: December 6, 1999

/s/ Judith C. Chirlin
Judge of the Superior Court

PROOF OF SERVICE

STATE OF CALIFORNIA
COUNTY OF LOS ANGELES

I, Christine Daniel, am employed in the aforesaid County, State of California; I am over the age of 18 years and not a party to the within action; my business address is 251 S. Lake Avenue, Suite 520, Pasadena, California 91101.

On September 30, 1999, I served the foregoing **[PROPOSED] JUDGMENT; NOTICE OF LODGING** on the interested parties in this action by placing a true copy thereof, enclosed in a sealed envelope, addressed as follows:

Lawrence William Steinberg
Steinberg & Steinberg
1424 Fourth Street, Suite 236
Santa Monica, CA 90401

X BY MAIL

_ I placed such envelope for deposit in the U.S. Mail for service by the United States Postal Service, with postage thereon fully prepaid.

X As follows: I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice, it would

be deposited with the United States Postal Service on that same day with postage thereon fully prepaid at Pasadena, California. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

_ (BY PERSONAL SERVICE) I caused such envelope to be delivered by hand to the offices of the addressee.

X (State) I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on September 30, 1999; at Pasadena, California.

/s/ Christine Daniel
DECLARANT

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES
DEPARTMENT NO. 34 HON. JUDITH C. CHIRLIN, JUDGE

ALEX COTA,	)	NO. BC 208017
PLAINTIFF,	)	
VS.	)	
DAVID SIMONTON, ET AL.,	)	
DEFENDANTS.	)	

REPORTER'S TRANSCRIPT
TUESDAY, SEPTEMBER 28, 1999

APPEARANCES:

FOR THE PLAINTIFF: STEINBERG & STEINBERG
BY: LAWRENCE W. STEINBERG, ESQ.
1424 4TH STREET
SUITE 236
SANTA MONICA, CA 90401

FOR THE DEFENDANT: GUTIERREZ, PRECIADO & HOUSE
BY: CALVIN R. HOUSE, ESQ.
200 SOUTH LOS ROBLES AVENUE
SUITE 210
PASADENA, CA 91101

VIRGINIA R. ISHIDA, CSR NO. 3784
OFFICIAL REPORTER

[1] LOS ANGELES, CALIFORNIA;
TUESDAY, SEPTEMBER 28, 1999

8:50 A.M.

DEPARTMENT NO. 34 HON. JUDITH C. CHIRLIN, JUDGE

(VIRGINIA R. ISHIDA, CSR NO. 3784, OFFICIAL REPORTER.)

THE COURT: THIS IS NUMBER 8 ON OUR CALENDAR. IT IS BC208017, COTA VERSUS SIMONTON.

WOULD YOU STATE YOUR APPEARANCES FOR THE RECORD, PLEASE.

MR. STEINBERG: LARRY STEINBERG FOR THE PLAINTIFF ALEX COTA.

MR. HOUSE: CALVIN HOUSE FOR THE DEFENDANTS AND THE MOVING PARTIES.

THE COURT: I APOLOGIZE FOR LEAVING YOU TO THE LAST OF THE CALENDAR. I USUALLY TAKE PEOPLE IN THE ORDER IN WHICH THEY CHECK IN. I KNOW YOU FOLKS WERE THE FIRST TO CHECK IN, BUT I THOUGHT THAT THIS MATTER WOULD PROBABLY TAKE A LITTLE BIT LONGER THAN THE OTHER ONES.

THIS IS ONE OF THE MORE INTERESTING MATTERS THAT I'VE SEEN ON MY CALENDAR LATELY. IT IS A MOTION TO STRIKE AND FOR ATTORNEY'S FEES. AND, AS I UNDERSTAND IT, THERE WAS AN ARTICLE THAT WAS PUBLISHED. WHAT IS THE KIND – WHAT IS THE –

JUST OUT OF CURIOSITY, WHAT IS THE PUBLICATION THAT THIS WAS PUBLISHED IN?

MR. STEINBERG: WELL, I'LL CHARACTERIZE IT BRIEFLY AND PERHAPS OPPOSING COUNSEL WILL AMPLIFY OR CORRECT, BUT IT'S A PERIODICAL PUBLICATION, I THINK MONTHLY BUT I'M NOT [2] POSITIVE OF THAT. ANYWAY PERIODICALLY PUBLISHED BY THE – PUBLISHED AT – TO AVOID BEING CONTROVERSIAL – AT THE UNIVERSITY OF CALIFORNIA AT LOS ANGELES LAW SCHOOL. IT'S CIRCULATED IN THE AREA, AS I UNDERSTAND, AND PARTICULARLY ADDRESSING ITSELF TO MATTERS OF LEGAL INTEREST AND PARTICULARLY PERHAPS TO THE LAW SCHOOL ITSELF. WE DIDN'T HAVE THAT AT THE LAW SCHOOL.

HAVE I STATED IT MORE OR LESS –

MR. HOUSE: YES. I THINK YOU'RE EVEN MORE CAREFUL THAN YOU NEED TO BE. IT'S THE LAW STUDENTS' NEWSPAPER AT THE UCLA LAW SCHOOL. THEY HAVE AN OFFICE AT THE LAW SCHOOL. IT'S NOT AN OFFICIAL UNIVERSITY PUBLICATION, BUT IT'S THE UCLA LAW SCHOOL NEWSPAPER PUBLISHED BY THE STUDENTS.

THE COURT: PROBABLY AS CLOSE TO BEING A PUBLICATION OF THE LAW SCHOOL THAT ONE COULD BE AND STILL NOT BE A PUBLICATION OF THE LAW SCHOOL.

MR. HOUSE: THE REGENTS HAVE UNDERTAKEN THE DEFENSE OF EVERYBODY INVOLVED. I THINK THAT'S AN INDICATION OF ITS STATUS.

THE COURT: WELL, I WAS JUST CURIOUS BECAUSE I NEVER ENCOUNTERED THIS, BUT I'M A USC PERSON SO –

MR. STEINBERG: YES.

THE COURT: THIS MOTION IS MADE UNDER C.C.P. 425.16 SOMETHING. AND IT IS ESSENTIALLY A MOTION TO DISMISS THE CASE.

IT SEEMS TO ME THAT THE MOTION SHOULD BE GRANTED. AS I UNDERSTAND THE REQUIREMENTS UNDER [3] THAT STATUTE, I AM REQUIRED TO BROADLY CONSTRUE THE STATUTE. THIS DOES INVOLVE A FREE SPEECH ISSUE. AND AS I UNDERSTAND THE LAW SURROUNDING THIS STATUTE, IT REQUIRES THAT ANY CAUSE OF ACTION AGAINST A PERSON FOR EXERCISING FREE SPEECH RIGHTS IN CONNECTION WITH A PUBLIC ISSUE MUST BE STRICKEN UNLESS THE COURT FINDS A PROBABILITY THAT THE PLAINTIFF WILL PREVAIL ON HIS CLAIM, AND I JUST CAN'T SEE IT HERE.

THIS IS AN ARTICLE THAT DISCUSSES NUMEROUS ITEMS OF VERY SIGNIFICANT PUBLIC INTEREST AND CONCERN, THE ADMINISTRATION OF A PUBLIC LAW SCHOOL, ISSUES OF MCCARTHYISM, AND ACTUALLY MCCARTHYISM BACK IN THE DAYS WHEN MCCARTHY WAS STILL AROUND, AS I UNDERSTAND IT. SO IT JUST SEEMED TO ME TO BE SOMETHING THAT STRIKES THE FREE FLOW OF IDEAS AND ALL THOSE VERY BASIC THINGS THAT THE FIRST AMENDMENT IS ALL ABOUT.

MR. STEINBERG?

MR. STEINBERG: YES, YOUR HONOR. THERE ARE ISSUES HERE TO BE CONSIDERED OF THE FREE SPEECH OF THE CLIENT – OF MY CLIENT ALEX COTA – WHO WAS, AS WE ALLEGE AND WAS IN FACT – THROWN OUT OF THE LAW SCHOOL AND SEEKS HERE TO REDRESS HIS GRIEVANCES. HE HAS FREE SPEECH RIGHTS AS WELL. AND IF HE IS TO BE PUNISHED FOR EXERCISING THOSE RIGHTS, WE ARE IN A VERY BAD SITUATION.

THE COURT: BUT THE LAWSUIT IS FOR LIBEL.

MR. STEINBERG: THE LAWSUIT IS FOR LIBEL, BUT NOTE THAT THE LAWSUIT RELATES TO QUESTIONS WHICH RENDER HIM LESS LIKELY TO BE ABLE TO BECOME AN ATTORNEY. THEY SAY, [4] "YOU DON'T WANT TO TAKE THE OATH?" HE LAUNCHED INTO PASSIONATE –

HE DIDN'T WANT TO TAKE THE OATH. THAT CONFUSES – AND FACTUALLY THAT CONFUSES SERIOUSLY WHAT WENT ON, BECAUSE MY CLIENT – AND INDEED THAT'S REFLECTED IN A RATHER GRUDGING AND WE THINK SOMEWHAT MALICIOUS WAY IN THE FOLLOW-UP ARTICLE THAT THE CO-EDITOR WROTE AND YOUR HONOR NOTED THAT.

BUT AT ANY RATE HE WANTED TO GET BACK INTO LAW SCHOOL, AND HOW DO YOU GET BACK WHEN A SERIOUS CLOUD IS CASE UPON YOU IN THE LEGAL COMMUNITY IF YOU SAY, "OH, I'M NOT WILLING TO TAKE THE OATH THAT THE STATUTES REQUIRE," THE OATH THAT YOU ATTACH TO THE CONSTITUTION AND SO ON.

THEY SPOKE IN THE ARTICLE AND INDEED THAT'S REALLY ADMITTED IN MARTIN'S – THE CO-EDITOR'S RESPONSE. THEY SPOKE AS THOUGH OUR CLIENT – AS THOUGH THE PLAINTIFF HERE – WAS PASSIONATE AGAINST TAKING AN OATH OF ALLEGIANCE TO THE CONSTITUTION. THAT'S NOT REALLY TRUE. IN FACT THAT'S NOT ONLY NOT REALLY TRUE, IT'S REALLY UNTRUE. IF I MAY SAY. AND THAT'S PERHAPS THE LEADING ONE, THOUGH NOT THE ONLY ONE OF THE CALUMNIES AGAINST MY CLIENT.

I DON'T THINK IT CAN BE SAID THAT FREE SPEECH OF THE NEWSPAPER MEANS THEY CAN SAY ANYTHING THEY WANT. I DON'T THINK IT SUPERSEDES THE LIBEL LAWS. I AN [sic], IT'S NOT ENOUGH TO SAY, "OH, WELL, THESE ARE IMPORTANT ISSUES. THAT'S ALL. GOOD-BYE." CAN THEY SAY ANYTHING? [5] CAN THEY MAKE ANY ACCUSATION THAT THEY CHOOSE AND IT'S PROTECTED? DON'T WE HAVE TO LOOK AT WHAT THE ARTICLE SAYS AND WHETHER IT TRULY IS CALUMNIOUS, WHETHER IT TRULY IS LIBELIST OR INTERPRETABLE IN THAT MANNER? AND IF IT IS, DOESN'T THAT GIVE THE RIGHT TO PROCEED WITH THE LAWSUIT? OTHERWISE IT REALLY WOULD BE TOTALLY DESTRUCTIVE. THE NEWSPAPER WOULD HAVE ABSOLUTELY FREE REIGN TO DO WHATEVER IT CHOSE, AND I DON'T THINK THAT IS THE LAW.

WE HAVE HERE A CLIENT WHO IS NOT TRYING TO HURT – WASN'T TRYING TO HURT ANYBODY. HE'D LIKE TO BE DECENTLY REGARDED IN THE LEGAL COMMUNITY. I SUPPOSE HE WOULD LIKE TO

GET BACK INTO – EVEN AT THIS LONG DELAY – HE WOULD LIKE TO GET BACK INTO LAW SCHOOL. AND I THINK THAT IT REALLY WOULD BE TOTALLY INCORRECT TO SAY, "OH, WELL. HE DOESN'T HAVE THE RIGHT TO LITIGATE THAT QUESTION. WE'VE GOT TO THROW HIM OUT OF HERE."

THE COURT: WELL, EVEN THE PASSAGES THAT YOU CITED AS THE BASIS FOR THE CLAIM DON'T SEEM TO BE DEFAMATORY TO ME. ONE OF THEM, FOR INSTANCE, "MR. COTA THEN JUMPED INTO A LENGTHY CONDEMNATION OF MCCARTHYISM AND A LOYALTY OATH. THE PASSION OF HIS TONE INDICATING THAT THIS TOPIC HELD A GOOD DEAL OF PERSONAL RELEVANCE TO HIM."

LOOKING AT THAT, THAT DOESN'T SEEM TO ME – ESPECIALLY IN THIS DAY AND AGE – TO BE DEFAMATORY. THAT'S SOMETHING TO BE LAUDATORY ABOUT, I THINK.

I READ THAT AND I THOUGHT, "GEE, THIS IS A GUY WHO STOOD UP FOR WHAT HE BELIEVED. GOOD FOR HIM." I DON'T SEE HOW IT'S DEFAMATORY.

[6] MR. STEINBERG: WELL, IT'S DEFAMATORY BECAUSE IT SAYS, "HE IS EXTRAORDINARILY UNWILLING TO ACCEPT THE OATH WHICH LAWYERS ARE REQUIRED TO ACCEPT," AND THAT IS PERFECTLY PROPER IN MY OPINION. I SIGNED IT FREELY ENOUGH. THAT SAYS THAT YOU BARE TRUE ALLEGIANCE TO THE CONSTITUTION OF THE SATE OF CALIFORNIA, AND I DON'T REMEMBER THE

EXACT WORKING, BUT THAT WAS THE TONE OF IT – AND OF THE UNITED STATES CONSTITUTION.

BUT WHAT HE WAS AGAINST AND WHAT THEY ACKNOWLEDGE IN THE MARTIN ARTICLE, YOUR HONOR, TO WHICH I COMMEND YOUR HONOR'S ATTENTION, WHAT HE WAS AGAINST AND THEY ACKNOWLEDGE THAT – OR THEY SORT OF SUBLIMINALLY ACKNOWLEDGED THAT TO BE MORE ACCURATE – HE WAS AGAINST THE NEGATIVE OF THE INCIDENT. "AND I DON'T BELONG TO THIS AND I DON'T BELONG TO THAT" OR ANYTHING THAT WOULD BE BAD OR WHATEVER THE OATH WAS BEFORE. I DON'T REMEMBER WHETHER IT TALKED, I GUESS, ABOUT OVERTHROW OF THE GOVERNMENT BY FORCE AND VIOLENCE, AND PERHAPS IT DID OR PERHAPS IT DIDN'T. I DON'T REMEMBER. IT REFERRED TO THE COMMUNIST PARTY SPECIFICALLY. BUT THAT OATH HE WAS AGAINST, AND I MIGHT ADD THAT OATH WAS FORTUNATELY, IN MY OPINION, BEEN THROWN INTO THE DUST BIN OF HISTORY SOME YEARS AGO.

THE COURT: RIGHT.

MR. STEINBERG: BUT IT WAS CALUMNIOUS TO SAY THAT DIDN'T BELIEVE IN THE REGULAR STANDARD – DECENT, APPROPRIATE AND CONTINUING LOYALTY OATH THAT WE – THE SO-CALLED OATH OF ALLEGIANCE TO THE CONSTITUTION – THAT WE NOW HAVE BEFORE US.

[7] THE COURT: MR. HOUSE?

MR. HOUSE: WELL, I THINK I'D JUST COMMENT ON THIS LOYALTY OATH ISSUE. THE ARTICLE DOESN'T SAY THAT MR. COTA WAS OPPOSED TO THE OATH OF ALLEGIANCE TO THE CONSTITUTION. IT SAYS HE JUMPED INTO A CONDEMNATION OF LOYALTY OATHS. HE HASN'T DENIED IN HIS DECLARATION HE FILED –

AS A MATTER OF FACT, HE TELLS US IN THE DECLARATION THAT HE IS OPPOSED TO LOYALTY OATHS AND GOES ON TO EXPLAIN THAT THERE ARE OATHS THAT HE'D BE WILLING TO SIGN ON TO. SO I DON'T SEE ANYTHING THAT IS FALSE THERE.

AND, AS THE COURT MENTIONED EARLIER, EVEN IF IT'S SOMEHOW FALSE, IT'S NOT DEFAMATORY. IT DOESN'T CALL HIM INTO DISREPUTE. AND FOR THE REST OF IT, I THINK, IT'S BEEN COVERED IN THE PAPERS.

MR. STEINBERG: WELL, HE SAYS WITH GREAT SPECIFICITY, I THINK, YOUR HONOR. I DON'T MEAN TO BE UNKIND TO OPPOSING COUNSEL, BUT I THINK HE SAYS WITH CONSIDERABLE SPECIFICITY THAT HE'S MORE THAN WILLING TO SIGN AND HAPPY TO SIGN AND SO ON THE OATH OF ALLEGIANCE TO THE CONSTITUTION. SO IT WOULD BE INCORRECT TO SAY THAT HE DOESN'T DENY –

HE DOES DENY THAT HE'S UNWILLING TO SIGN A REGULAR OATH OF ALLEGIANCE, WHAT WE NOW CALL –

I DON'T KNOW WHETHER THEY STILL CALL IT THE LOYALTY OATH OR NOT, BUT IT'S NOT THE

LOYALTY OATH – THE NEGATIVE LOYALTY OATH THAT WAS SUCH A GREAT SOURCE OF DISPUTE YEARS AGO AND WHICH THE MCCARTHY SUPPORTERS [8] SUPPORTED. BUT THAT WENT DOWN THE TUBES, AND THERE REALLY IS A CALUMNIOUS QUALITY TO THAT. I THINK THERE ARE CALUMNIOUS QUALITIES TO SOME TO THE OTHERS AS WELL. ALTHOUGH I ADMIT THAT IT'S POSSIBLE THAT ONE MIGHT BE REGARDED AS PURE MATTERS OF OPINION SO THAT'S JUST TOUGH. THIS IS WHAT WE THINK.

BUT IT REALLY IS UNTRUE THAT IN THIS INSTANCE FOR SURE, IN OUR OPINION, THERE IS A LIBELIST QUALITY.

THE COURT: MR. STEINBERG, YOU MENTIONED SOMETHING EARLIER ABOUT MR. COTA'S ATTEMPT TO BE ADMITTED TO THE BAR. WHAT DOES THIS –

HOW WOULD THIS LAWSUIT IN ANY WAY AFFECT THAT?

MR. STEINBERG: WELL, IN THE FIRST PLACE IT PROBABLY AFFECTS HIS CAPACITY. IT WOULD AFFECT HIS ABILITY TO GET BACK INTO LAW SCHOOL IN OUR OPINION. BUT AS YOUR HONOR KNOWS, THERE ARE CHARACTER EXAMINATIONS, WHICH I MUST ADMIT SEEM TO ME TO BE DONE IN A RATHER SPOTTY FASHION.

THE COURT: BASED ON WHAT I READ IN THE NEWSPAPER THESE DAYS, YES, I WOULD SAY SO.

MR. STEINBERG: WELL, OUR VIEW, FRANKLY, IS THAT –

I MEAN, I DON'T KNOW HOW MUCH THE PAPERS REFLECT. OUR VIEW IS THAT HE'S A COMPLETELY DECENT PERSON, BUT THAT HE NONETHELESS COULD BE SERIOUSLY BESMIRCHED BY SAYING HE WOULDN'T EVEN BE WILLING TO TAKE THE OATH OF ALLEGIANCE TO THE CONSTITUTION. SO WHAT'S THE [9] USE? WHAT'S THE USE FOR THE LAW SCHOOL TO ADMIT HIM AND WHY SHOULD THE BAR CONSIDER HIM SERIOUSLY?

BUT HE REALLY IS WILLING TO TAKE THE OATH. HE REALLY IS WILLING AND THEY SAY HE'S WILLING. THE CLEAR THRUST OF THAT IS THAT HE'S UNWILLING, AND WE DON'T BELIEVE THAT. WE KNOW THAT'S NOT SO, OR AT LEAST WE'RE MORE THAN HAPPY TO HAVE THAT PUT TO THE TRUTH.

THE COURT: WELL, I JUST DON'T THINK THAT THIS IS A CASE THAT MEETS THE STANDARDS THAT I HAVE TO APPLY, WHICH IS THE LIKELIHOOD THAT HE WILL PREVAIL.

I AM GOING TO GRANT THE MOTION, MR. STEINBERG. IF YOU WANT TO TAKE IT DOWN THE STREET AND SEE IF YOU CAN GET TWO OF THOSE JUSTICES DOWN THERE TO DISAGREE WITH ME, I WILL WELCOME YOU BACK, WITH OPEN ARMS. BUT I REALLY BELIEVE THAT THIS IS A CASE FOR WHICH THE ANTI-SLAP SUIT CODE SECTION IS DESIGNED. AND I WOULD HATE TO SEE YOU GO THROUGH A WHOLE TRIAL – GO THROUGH THE EXPENSE OF A WHOLE TRIAL AND THEN IF YOU WIN, HAVE IT

REVERSED ON APPEAL, WHICH I BELIEVE IT WOULD BE BECAUSE I JUST DON'T THINK THE LEGAL BASIS IS THERE. SO I AM GOING TO GRANT THE MOTION.

NOW, THE STATUTE PROVIDES FOR ATTORNEY'S FEES, ALTHOUGH THE REQUESTS FOR ATTORNEY'S FEES WAS NOT APPROPRIATELY NOTICED. THERE WAS NOT ANY SUPPORT FOR IT UNTIL THE REPLY.

ANY OBSERVATION ABOUT THAT?

MR. HOUSE: WELL, IT IS A CONUNDRUM UNDER THE STATUTE AS TO HOW YOU SHOULD PROCEED WITH THAT. WHAT I'D [10] BE HAPPY TO DO IS TO TREAT THIS AS A COST ITEM. WE COULD FILE A MOTION FOR ATTORNEY'S FEES AS A COST ITEM AFTER JUDGMENT IF THAT WOULD BE A MORE APPROPRIATE PROCEDURE, BECAUSE THE COST STATUTE DOES PROVIDE FOR ATTORNEY'S FEES TO BE PART OF THE COST AS IT'S OTHERWISE PROVIDED BY STATUTE, THE SAME AS CIVIL RIGHTS ATTORNEY'S FEES ARE DEALT WITH.

THE COURT: MR. STEINBERG, ANY VIEW ON THAT?

MR. STEINBERG: YES. I HAVE TWO THINGS I WOULD LIKE TO SAY. I DON'T WANT TO REARGUE THE REST OF THE MATTER, ALTHOUGH I'D SURELY LIKE TO. BUT IT SEEMS TO ME THAT MY CLIENT IS BEING PUNISHED VERY SEVERELY FOR BRINGING UP THESE THINGS, AND THAT IN THE ORDINARY LIBEL SUIT, ONE –

YOU KNOW, EVERY CASE IS SUBJECT TO REVERSAL ON APPEAL. SO IT'S SORT OF SAD NOT TO BE

ALLOWED TO GO TO COURT TO ESTABLISH ONE'S RIGHTS, TO MAKE THE EFFORT TO GO TO COURT.

THE COURT: WELL, I DIDN'T MEAN MY COMMENT TO SUGGEST THAT –

I DIDN'T MEAN MY COMMENT TO SUGGEST THAT I DIDN'T THINK THAT MY RULING ON THIS IS THE CORRECT ONE ON THE LAW. I BELIEVE I'M MAKING THE CORRECT DECISION ON THE LAW. I JUST MADE THE COMMENTS BECAUSE I KNOW THAT SOME OTHER LITIGANTS IN SOME –

SOME LITIGANTS IN SOME OTHER COURTS HAVE TOLD ME THAT WHEN THEY HAVE TAKEN SOMETHING UP TO THE COURT OF APPEAL AND IT GETS REVERSED, THEY RECEIVE A [11] RATHER HOSTILE RECEPTION WHEN THEY COME BACK. AND I WAS ASSURING YOU THAT IF THAT WERE THE CASE, YOU WOULD NOT HAVE TO BE CONCERNED ABOUT THAT.

MR. STEINBERG: WELL, TWO QUICK WORDS.

ONE IS THAT WE ASK IN THE PAPERS AND I ACKNOWLEDGE THAT IT WAS NOT A NOTICED MOTION, BUT I FEEL IT'S TIME TO MAKE A NOTICED MOTION THAT WE HAVE THE OPPORTUNITY TO DO DISCOVERY SO THAT WE COULD ACTUALLY FIND OUT MORE ABOUT THE SUBSTANCE OF OUR CLAIM.

THIS IS LIKE A BLITZKRIEG THAT DESTROYS US. I DON'T MEAN THAT IN A PERSONAL MATTER, BUT THE LEGAL EFFECT IS TO WIPE US OUT ENTIRELY.

AND I SHOULD ALSO SAY – AND I THINK IT'S THE *BROWN* CASE – IN AN EFFORT TO SAVE THE CONSTITUTION 425.16, *LAFAYETTE MOREHOUSE* (PH.) *VERSUS THE CHRONICLE* CITED IN THE PAPERS OF OPPOSING COUNSEL, SAYS THERE MAY NOT BE ENOUGH TIME WITH THE MOTION TO STRIKE TO DO MUCH, BUT IT SAYS, "NOTHING PREVENTS THE COURT" – UNDERLINED OR EMPHASIZED – "FROM CONTINUING THE HEARING TO A LATER DATE SO THAT THE DISCOVERY IT AUTHORIZED CAN BE COMPLETED. WHERE A REASONABLE EXERCISE IN DISCRETION" –

THE COURT: BUT I CAN'T ENVISION WHAT DISCOVERY YOU WOULD TAKE THAT WOULD MAKE THIS ANY MORE JUSTIFIABLE A LAWSUIT.

MR. STEINBERG: WELL, YOUR HONOR, I DON'T KNOW HOW –

I SUPPOSE – I THINK THERE ARE A LOT OF ADMISSIONS THAT MIGHT BE MADE BY MR. SIMONTON, FOR [12] EXAMPLE, AND PERHAPS PARTICULARLY – OR MARTIN SAYS – HIS SIDE KICK – THAT MIGHT BE OF SERIOUS SIGNIFICANCE IN SHOWING WHAT HE DID –

I MEAN, WHY HE DID WHAT HE DID. AND QUESTIONS OF WHETHER THERE WAS RECKLESS DISREGARD OR WHETHER IT WAS FALSE AND DEFAMATORY AND SO ON. AND I WOULD VERY MUCH LIKE THAT OPPORTUNITY AND I WILL STATE THAT. I THINK THE COURT –

I DON'T KNOW. I DON'T WANT TO ANTICIPATE THE COURT, BUT I UNDERSTAND THAT MAY NOT PROVE LOGICALLY COERCIVE TO THE COURT.

THE COURT: MR. HOUSE?

MR. HOUSE: I DON'T THINK WE NEED TO GET TO RECKLESS DISREGARD, BECAUSE IF THE WORDS AREN'T DEFAMATORY, THERE'S NO REASON TO GO AHEAD. AND THAT'S WHY THE ANTI-SLAP STATUTE IS THERE, TO PREVENT DEFENDANTS AND PLAINTIFFS, TOO, FROM GOING THROUGH ALL OF THIS DISCOVERY EFFORT FOR NO REASON.

THE COURT: I AGREE WITH THAT.

I AM GONG TO GRANT THE MOTION.

AND MR. HOUSE, I WILL TAKE YOU UP ON YOUR INVITATION TO TREAT THE ATTORNEY'S FEES REQUEST –

YOU'RE GOING TO FILE A MOTION SO THAT MR. STEINBERG WILL HAVE AN OPPORTUNITY TO FOCUS SPECIFICALLY ON THE ATTORNEY'S FEES?

MR. HOUSE: WHAT I PROPOSE TO DO IS SUBMIT A PROPOSED JUDGMENT. ONCE THAT'S ENTERED, THEN PROCEED JUST AS ONE ORDINARILY WOULD FOR ATTORNEY'S FEES BY STATUTE – [13] FILE A NOTICED MOTION.

MR. STEINBERG: I SERVE NOTICE ORALLY THAT I OBJECT TO THAT, AND I THINK, YOU KNOW, WE DON'T THINK EITHER (A) THAT SUBSTANTIVELY THE ATTORNEY'S FEES OUGHT TO BE AWARDED AND (B) WE DON'T THINK THAT THE PROCEDURE

THAT HAS BEEN SUGGESTED IS A CORRECT DECISION.

THE COURT: WELL, THE CORRECT PROCEDURE, AS I UNDERSTAND IT, IS THAT I RULE ON THE ATTORNEY'S FEES RIGHT NOW. BUT MR. HOUSE DIDN'T GIVE YOU ADEQUATE NOTICE OF WHAT HE WAS ACTUALLY SPECIFICALLY ASKING FOR. SO I WOULD PREFER TO DO IT BY WAY OF A NOTICED MOTION, WHICH WOULD THEN, MR. STEINBERG, GIVE YOU AN OPPORTUNITY TO SHOW ME –

IF YOU CAN SHOW ME THAT ATTORNEY'S FEES ARE NOT MANDATED, THAT IT'S DISCRETIONARY, I WOULD BE DELIGHTED TO CONSIDER THAT AND SEE WHERE WE GO FROM THAT. BUT AT THIS POINT I SEE THE STATUTE SAYS "PROVIDES FOR ATTORNEY'S FEES," SO I WOULD WELCOME BEING EDUCATED ON WHETHER THAT'S A MANDATORY OR A DISCRETIONARY ATTORNEY'S FEES AND ALSO WHAT YOUR VIEWS ARE ON THE ACTUAL AMOUNTS THAT MR. HOUSE IS SUGGESTING. OKAY?

MR. HOUSE: THANK YOU, YOUR HONOR.

THE COURT: THANK YOU VERY MUCH.

YOU MAY HAVE HEARD ME TELL SOME OTHERS THAT I'M GOING TO BE IN A BIG TRIAL, SO FRIDAYS WILL BE –

WHEN YOU CALL IN TO SCHEDULE THE MOTION , GET IT FOR FRIDAY.

MR. HOUSE, YOU'LL PREPARE THE ORDER, RIGHT?

MR. HOUSE: YES, THE JUDGMENT, YES.

[14] (PROCEEDINGS IN THE ABOVE-ENTITLED MATTER WERE CONCLUDED.)

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

DEPARTMENT NO. 34 HON. JUDITH C. CHIRLIN, JUDGE

ALEX COTA, PLAINTIFF, VS. DAVID SIMONTON, ET AL., DEFENDANTS.	NO. BC 208017 REPORTER'S CERTIFICATE

I, VIRGINIA R. ISHIDA, OFFICIAL REPORTER OF THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, FOR THE COUNTY OF LOS ANGELES, DO HEREBY CERTIFY THAT THE FOREGOING PAGES 1 THROUGH 14, INCLUSIVE, COMPRISES A FULL, TRUE, AND CORRECT TRANSCRIPT OF THE PROCEEDINGS HELD IN THE ABOVE-ENTITLED MATTER ON SEPTEMBER 28, 1999.

DATED THIS 20TH DAY OF APIRL, 2000.

/s/ Virginia R. Ishida, CSR No. 3784
OFFICIAL REPORTER

2nd Civil No.
B138922

IN THE
Court of Appeal
STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION TWO

ALEX COTA,

Plaintiff and Appellant,

vs.

DAVID SIMONTON, SUSAN WESTERBERG PRAGER and BOARD OF REGENTS OF THE UNIVERSITY OF CALIFORNIA,

Defendants and Respondents.

APPEAL FROM
SUPERIOR COURT OF LOS ANGELES COUNTY
HONORABLE JUDITH C. CHIRLIN, JUDGE
L.A.S.C. No. BC 208017

RESPONDENTS' BRIEF

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if proved at trial, support a judgment in plaintiff's favor."[17] Plaintiff's showing must rest on competent, admissible evidence.[18]

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[17] *Church of Scientology of California v. Wollersheim* (1996) 42 Cal.App.4th 628, 646, quoting *Wilcox v. Superior Court* (1994) 27 Cal.App.4th 809, 823.

[18] *Macias v. Hartwell* (1997) 55 Cal.App.4th 669, 675; *Church of Scientology, supra,* 42 Cal.App.4th at p. 654.

A. Publishing the article was in furtherance of free speech rights in connection with a public issue

Although Mr. Cota argued in the Superior Court that section 425.16 did not apply to his lawsuit, he has not pursued that argument in this Court. In any event, it is settled that writing and publishing an article in a newspaper constitute acts in furtherance of free speech rights.[19]

There is also no question that the article involved a public issue, as Mr. Cota's brief essentially concedes.[20] It concerned Mr. Cota's allegations that the dean of a prominent public law school had engaged in wrongful

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[19] *Braun v. Chronicle Publishing Co.* (1997) 52 Cal.App.4th 1036, 1045; *Lafayette Morehouse, Inc. v. Chronicle Publishing Co.* (1995) 37 Cal.App.4th 855, 862-864, cert. den. (1996) 519 U.S. 809.

[20] "The publication was before a large public law school, part of the huge University of California at Los Angeles." (Opening Brief, 1A:5-7.) "Violations of the above-cited oath; especially, by those (like Hanna and Robbins) who betray the public trust; such violations are not (as Simonton states) the '*misfortunes*' of culprits, but the tragic misfortune of the people, the public." (Opening Brief, 5:2-5.) "The appellant, Alex Cota, is a resident of the City of Los Angeles, California, with a long-standing grievance with the University of California School of Law (UCLAW)." (Opening Brief, 9:5-7.) "Since 1982, appellant made many appeals for justice in his case to Dean Prager – to no avail." (Opening Brief, 9:12-14.) "With a fair and true report, appellant had hoped to approach the 'audience' of law students, faculty and university for help on a petition for readmission to UCLAW." (Opening Brief, 17:8-10.)

American" political views. Based on what we *know*, however, we cannot say that J. Alex Cota was one of them.[43]

C. Mr. Cota could not have prevailed because there was no evidence of actual malice

A public figure plaintiff must show by "clear and convincing evidence" that any defamatory statement was made with actual malice. Actual malice is a knowing or reckless disregard for the truth.[44] A public figure is one who voluntarily injects himself into a public controversy, and attempts to influence the resolution of the issues involved.[45] Whether the plaintiff is a public figure is a question of law for the court to decide.[46]

1. Mr. Cota was a limited purpose public figure

Mr. Cota has continuously sought public attention in connection with his charges against Dean Coffman, and his attempts to gain readmission to UCLA Law School. The evidence before the Superior Court established that Mr. Cota attempted to influence the resolution of issues involved in the controversy over Dean Coffman.

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[43] CT 17.

[44] *Copp, supra,* 45 Cal.App.4th at p. 846.

[45] *Reader's Digest Assn. v. Superior Court* (1984) 37 Cal.3d 244, 254, cert. den. (1986) 478 U.S. 1009; *Copp, supra,* 45 Cal.App.4th at pp. 845-846.

[46] *Copp, supra,* 45 Cal.App.4th at p. 845; *Rudnick, supra,* 25 Cal.App.4th at p. 1190.

He asked UCLA and the Regents to investigate his case.[47] He filed two lawsuits.[48] He was involved in an editorial that appeared in the October 1980 issue of *The Docket*, which had described his allegations, and called for his reinstatement.[49] He initiated the contact with *The Docket* that led to Mr. Simonton's article.[50] He asked Mr. Simonton to circulate a petition to the student body, calling for his reinstatement.[51] He also distributed a flyer that discussed the matters in the article, and incorporated newspaper clippings that he had collected.[52]

Therefore, there is no question that Mr. Cota was a public figure for the limited purpose of the controversy surrounding Dean Coffman and Mr. Cota's expulsion from UCLA Law School.

2. There was no evidence of actual malice

Actual malice requires proof of a knowing or reckless disregard for the truth.[53] Mr. Cota did not present any evidence to support a finding that Mr. Simonton knowingly or recklessly disregarded the truth.

Mr. Cota devotes most of his brief to expounding his case against Dean Coffman. However, Mr. Simonton

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[47] CT 66:10-21.

[48] CT 66:18-24.

[49] CT 36:26-37:3.

[50] CT 35:9-14; 36:20-25.

[51] CT 38:25-39:2.

[52] CT 42:12-20.

[53] *Copp. supra,* 45 Cal.App.4th at p. 837.

reported the gist of that case in his article. He simply drew different conclusions than Mr. Cota did from the available evidence.

For example, Mr. Cota asserts that he did not ask Dean Coffman if he was afraid of Joe McCarthy. Yet, Dean Coffman testified at his deposition that Mr. Cota did so.[54] The law of defamation did not require Mr. Simonton to adopt Mr. Cota's version.

Similarly, Mr. Cota believed that Dean Coffman deliberately misled him about the availability of summer school to boost his average. Based on what Mr. Cota told him about the incident, Mr. Simonton questioned whether there was deliberate deception. That disagreement does not prove actual malice.

Mr. Simonton's declaration and the article itself established the absence of actual malice. Mr. Simonton took information the [sic] Mr. Cota gave him, and wrote a story about it. He attempted in good faith to tell the truth as he saw it.[55] He was careful to distinguish what was known through documentary evidence, and what could only be inferred from the available information. There was nothing that Mr. Cota, or anyone else, told him that should have alerted him to any false statements in the article. Mr. Simonton should be complimented for his evenhanded treatment of Mr. Cota's story, not made the subject of a libel suit.

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[54] CT 77.

[55] CT 40:6-13.

50 Am Jur 2d § 75. – Tests for determining status of limited-purpose public figure

In several circuits the Courts of Appeals have adopted a three-step test for determining whether a plaintiff has the status of a limited-purpose public figure: (1) the controversy at issue must be public both in the sense that people are discussing it and people other than the immediate participants in the controversy are likely to feel the impact of its resolution; (2) the plaintiff must have more than a trivial or tangential role in the controversy; and (3) the alleged defamation must be germane to the plaintiff's participation in the controversy.[70] Under the first step of the test, the public controversy must be more than merely newsworthy, and it must not be an essentially private concern such as divorce; an issue is a public controversy if it is being debated publicly and it has foreseeable and substantial ramifications for nonparticipants.[71] Under the second step of the test, the plaintiff

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[70] Trotter v Jack Anderson Enters. (CA5 Tex) 818 F2d 431, 14 Media L R 1180, 8 FR Serv 3d 451; Silvester v American Broadcasting Cos. (CA11 Fla) 839 F2d 1491, 15 Media L R 1138; Waldbaum v Fairchild Publications, 201 US App DC 301, 627 F2d 1287, 5 Media L R 2629, cert den 449 US 898, 66 L Ed 2d 128, 101 S Ct 266 and (criticized on other grounds by Dameron v Washington Magazine, 250 US App DC 346, 779 F2d 736, 12 Media L R 1508).

[71] Silvester v American Broadcasting Cos. (CA11 Fla) 839 F2d 1191, 15 Media L R 1138 (holding that there was a valid public controversy involving corruption in the jai alai industry because of the highly regulated nature of the industry, the large amounts of state revenues potentially affected by corruption in the industry, and the large numbers of the general public that frequent jai alai frontons): Waldbaum v Fairchild Publications, 201 US App DC 301, 627 F2d 1287, 5 Media L R 2629, cert den

either must purposely try to influence the outcome or could reasonably have been expected, because of his position in the controversy, to have an impact on its resolution.[72]

Under another approach, to prove that a plaintiff is a limited-purpose public figure, a defendant must show that the plaintiff has (1) successfully invited public attention to his views in an effort to influence others prior to the incident that is the subject of litigation; (2) voluntarily injected himself into a public controversy related to the subject of the litigation; (3) assumed a position of prominence in the public controversy; and (4) maintained regular and continuing access to the media.[73]

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449 US 898, 66 L Ed 2d 128, 101 S Ct 266 and (criticized on other grounds by Dameron v Washington Magazine, 250 US App DC 346, 779 F2d 736, 12 Media L R 1508).

[72] Silvester v American Broadcasting Cos. (CA11 Fla) 839 F2d 1491, 15 Media L R 1138 (holding that plaintiffs were in a position to influence the resolution of the controversy over corruption in the jai alai industry, because they held positions of prominence in an industry with a very limited number of major figures and because they were the primary or sole focus of certain aspects of the controversy); Waldbaum v Fairchild Publications, 201 US App DC 301, 627 F2d 1287, 5 Media L R 2629, cert den 449 US 898, 66 L Ed 2d 128, 101 S Ct 266 and (criticized on other grounds by Dameron v Washington Magazine, 250 US App DC 346, 779 F2d 736, 12 Media L R 1508).

[73] Lerman v Flynt Distributing Co. (CA2 NY) 745 F2d 128, 10 Media L R 2497, cert den 471 US 1054, 85 L Ed 2d 479, 105 S Ct. 2114, later proceeding (CA2 NY) 789 F2d 164, 4 FR Serv 3d 651, cert den 479 US 932, 93 L Ed 2d 357, 107 S Ct 404; Pesta v CBS, Inc. (ED Mich) 686 F Supp 166, 15 Media L R 1798.

Another circuit has adopted a five-factor test for determining whether a plaintiff is a limited-purpose public figure: (1) the plaintiff had access to channels of effective communication; (2) the plaintiff voluntarily assumed a role of special prominence in a public controversy; (3) the plaintiff sought to influence the resolution or outcome of the controversy; (4) the controversy existed prior to the publication of the defamatory statements; and (5) the plaintiff retained public figure status at the time of the alleged defamation.[74]

Under another approach, whether an individual is a limited-purpose public figure depends upon a two-part analysis: (1) does a public controversy exist; and (2) what was the nature and extent of the individual's participation in the public controversy?[75]

Definition: a public controversy for this purpose is defined as a real dispute, the outcome of

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[74] Foretich v Capital Cities/ABC (CA4 Va) 37 F3d 1541, 22 Media L R 2353; Reuber v Food Chemical News, Inc. (CA4 Md) 925 F2d 703, 18 Media L R 1689, cert den 501 US 1212, 115 L Ed 2d 986, 111 S Ct 2814 (finding a research scientist and self-styled whistleblower to be a limited-purposes public figure); Fitzgerald v Penthouse Int'l (CA4 Md) 691 F2d 666, 8 Media L R 2340, cert den 460 US 1024, 75 L Ed 2d 497, 103 S Ct 1277, appeal after remand (CA4 Md) 776 F2d 1236, 12 Media L R 1330, 19 Fed Rules Evid Serv 661, 3 FR Serv 3d 837, holding that a person who researched the military application of dolphin technology and lectured and published on the subject was a limited-purpose public figure.

[75] McDowell v Paiewonsky (CA 3 VI) 769 F2d 942, 11 Media L R 2396; Partington v Bugliosi (DC Hawaii) 825 F Supp 906.

> which affects the general public or some segment of it.[76] The nature and extent of an individual's involvement in a public controversy is determined by three factors: (1) the extent to which participation in it is voluntary; (2) the extent to which there is access to channels of effective communication in order to counteract false statements; and (3) the prominence of the role played in the public controversy.[77]

A similar approach focuses on two questions: the threshold question of whether the defamatory statement involves a matter of public concern, and whether the level of the plaintiff's participation in the controversy invites scrutiny.[78]

§ 75 – Tests for determining status of limited-purpose public figure

Cases

For purposes of defamation action, person who has been publicly accused of committing act of serious sexual misconduct that it would be punishable by imprisonment cannot be deemed limited-purpose public figure merely

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[76] Waldbaum v Fairchild Publications, 201 US App DC 301, 627 F2d 1287, 5 Media L R 2629, cert den 449 US 898, 66 L Ed 2d 128, 101 S Ct 266.

As to the definition of public controversy generally, see § 69.

[77] Partington v Bugliosi (DC Hawaii) 825 F Supp 906.

[78] Lewis v McGraw-Hill Broadcasting Co. (Colo App) 832 P2d 1118, 20 Media L R 1240.

because he made reasonable public replies to those accusations. Foretich v Capital Cities/ABC (1994, CA4 Va) 37 F3d 1541, 22 Media L R 2353.

In action by two activist-protesters who were opposed to public university's construction of volleyball courts on university-owned land used as park and who alleged that university defamed them by attributing violent and destructive actions to them, court did not err in finding that activist-protesters were limited purpose public figures who had to demonstrate actual malice where they spoke publicly at city council meetings and at political and cultural rallies, where one of them wrote letter to editor of local newspaper and "open letter" to university and city, spoke to print media reporters who included his comments about park, and regularly staffed "information table" at park, and where other activist-protester also invited publicity by participating in press conference regarding incident at demonstration in which she was arrested. Nadel v Regents of University of California (1994, 1st Dist) 28 Cal App 4th 1251, 34 Cal Rptr 2d 188, 94 CDOS 7536, 94 Daily Journal DAR 13810, 22 Media L R 2481, review den (Cal) 1994 Cal LEXIS 6849.

Land use applicants were limited public figures, and thus even defamatory speech by persons having legitimate interest in what was going on at applicants' club was protected under First Amendment and non-actionable provided only that it was not uttered with actual malice, that is, neither known by speaker to be false or uttered with reckless disregard of its truth or falsity. U.S. Const. Amend. 1. LoBiondo v. Schwartz, 323 N.J. Super. 391, 733 A.2d 516 (App. Div. 1999).

Generally-accepted test to determine whether individual is limited-purpose public figure is that: (1) controversy at issue must be public both in sense that people are discussing it and people other than immediate participants in controversy are likely to feel impact of its resolution, (2) plaintiff must have more than trivial or tangential role in controversy, and (3) alleged defamation must be germane to plaintiff's participation in controversy. WFAA-TV, Inc. v. McLemore, 978 S.W.2d 568 (Tex. 1998).

Television reporter reached limited-purpose public-figure status when he voluntarily injected himself into Bureau of Alcohol, Tobacco and Firearms (ATF) raid on religious sect compound that resulted in gunfight, for purposes of his defamation claim against competitor television station based on competitor's displaying footage of his coverage from scene of compound during raid while reporting that federal officials believed member of local media informed sect about raid, as why ATF raid failed was public controversy and alleged defamation directly related to reporter's participation in controversy. WFAA-TV, Inc. v. McLemore, 978 S.W.2d 568 (Tex. 1998).

(2) Businesses or Business Persons [§§ 77-81]

Supreme Court, U.S.
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No. 00-1858

In The

Supreme Court of the United States

J. ALEX COTA,

Petitioner,

v.

DAVID SIMONTON, *THE DOCKET*, AN UNINCORPORATED ASSOCIATION, SUSAN WESTERBERG PRAGER AND BOARD OF REGENTS OF THE UNIVERSITY OF CALIFORNIA,

Respondents.

On Petition For Writ Of Certiorari To The California Court Of Appeal, Second Appellate District, Division Two

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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22 pp

QUESTIONS PRESENTED

1. This Court's jurisdiction over a state court decision only extends to review of federal questions that the state court necessarily decided. Should the Court grant certiorari to review a state court's determination that a plaintiff was a public figure where its decision rests on the adequate and independent ground that the offending statements were not defamatory under state law?

2. This Court has explained the principles used to determine whether an individual is a public figure several times since it introduced the concept to First Amendment jurisprudence in *Curtis Publishing Co. v. Butts*. Should the Court grant certiorari to consider the concept again in a case where the state court applied those settled principles, and held an individual to be a public figure who had injected himself into a controversy at a public university, and attempted to influence resolution of the issues involved?

3. This Court only has jurisdiction to consider issues that petitioner properly raised in state court. Should the Court grant certiorari to decide the constitutionality of a state statute, where the state appellate court did not pass on the issue because petitioner failed to press it in the trial court?

4. This Court has ruled that state regulation of the litigation process is constitutional so long as it does not obstruct the presentation of nonfrivolous legal claims. Should the Court grant certiorari to determine the constitutionality of California's anti-SLAPP statute, which

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provides an expedited method for disposing of non-meritorious lawsuits that target actions in furtherance of free speech rights?

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STATEMENT OF THE CASE

A. The California anti-SLAPP statute

SLAPP is an acronym for Strategic Lawsuit Against Public Participation.[1] It refers to a lawsuit that targets the exercise of the defendant's free speech rights. Concerned about the proliferation of SLAPP lawsuits and the resulting chill on the exercise of constitutional rights, the California Legislature enacted Code of Civil Procedure section 425.16. As the California Court of Appeal has explained, section 425.16 is designed to "nip SLAPP litigation in the bud," by promptly eliminating non-meritorious claims that fall within its purview.[2]

Under section 425.16, a SLAPP suit is subject to a special motion to strike, to be filed within 60 days after service of the complaint and heard within 30 days thereafter.[3] Initially, the movant must show that the SLAPP suit arises from an act "in furtherance of the person's right of petition or free speech under the United States or California Constitution in connection with a public issue." The burden then shifts to the plaintiff to establish a "probability" that he or she will prevail.[4] The prevailing party is entitled to attorney's fees and costs.[5]

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[1] *See* Penelope Canan & George Pring, *Strategic Lawsuits Against Public Participation*, 35 Soc. Probs. 506 (1988); Comment, *Strategic Lawsuits Against Public Participation: An Analysis of the Solutions*, 27 Cal. W.L. Rev. 399 (1991).

[2] *Braun v. Chronicle Publ'g Co.*, 61 Cal. Rptr. 2d 58, 61 (Ct. App. 1997).

[3] Cal. Civ. Proc. Code § 425.16(f).

[4] Cal. Civ. Proc. Code § 425.16(b)(1).

[5] Cal. Civ. Proc. Code § 425.16(c).

The filing of a motion under section 425.16 stays all discovery. A plaintiff who needs discovery to establish probability of success may obtain it by showing good cause.[6] To show good cause, the plaintiff need only explain what additional information is sought, and how it bears upon the issues raised by the anti-SLAPP motion.[7] The trial court may continue the motion to a date beyond the time frame established in section 425.16 to allow the plaintiff to complete any necessary discovery.[8]

To establish a probability of success, the plaintiff need only "make a prima facie showing of facts which would, if proved at trial, support a judgment in plaintiff's favor."[9] This test "is similar to the standard applied to evidentiary showings in summary judgment motions . . . and requires that the showing be made by competent admissible evidence within the personal knowledge of the declarant."[10] In determining probability of success,

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[6] Cal. Civ. Proc. Code § 425.16(g); *Church of Scientology v. Wollersheim*, 49 Cal. Rptr. 2d 620, 631 n.3 (Ct. App. 1996) ("the provision allowing discovery for good cause provides plaintiff a means to avoid any legitimate prejudice due to the alacrity of the proceedings").

[7] *Sipple v. Foundation For Nat'l Progress*, 83 Cal. Rptr. 2d 677, 690 (Ct. App. 1999) (denying discovery where "appellant does not explain what additional facts he expects to uncover, or why such far-ranging discovery is necessary to carry his burden of showing [defendant]'s malice").

[8] *Lafayette Morehouse, Inc. v. Chronicle Publ'g Co.*, 44 Cal. Rptr. 2d 46, 54 (Ct. App. 1995).

[9] *Wilcox v. Superior Court*, 33 Cal. Rptr. 2d 446, 454 (1994).

[10] *Church of Scientology*, 49 Cal. Rptr. 2d at 635. *See also College Hosp., Inc. v. Superior Court*, 882 P.2d 894, 903 n.6 (Cal. 1994).

the trial court may not weigh the defendant's evidence against the plaintiff's, but may only determine whether the uncontroverted evidence defeats the plaintiff's claim, as a matter of law.[11]

On appeal from the grant of an anti-SLAPP motion, the "appellate court independently reviews the entire record to determine whether the plaintiff has made a sufficient prima facie case such that it would prevail in light of the applicable law regarding the complaint."[12]

B. Mr. Cota's lawsuit

According to Mr. Cota's complaint, he entered UCLA Law School in 1951-52, at a time when "Senator Joe McCarthy was a leading proponent of wild and unsubstantiated attacks upon the American government and the United States Army." He alleged that L. Dale Coffman, the first dean of the Law School, "was an ardent follower of Joe McCarthy and McCarthyism." After allegedly enduring a harangue by Dean Coffman in class, Mr. Cota spoke up against him. Dean Coffman allegedly retaliated against him by giving him a low grade, and by convincing other professors to give him low grades. As a result, Mr. Cota was not permitted to continue in the Law School. Since then, he has attempted unsuccessfully to gain readmission.[13]

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[11] *Lafayette Morehouse*, 44 Cal. Rptr. 2d at 53.

[12] *Monterey Plaza Hotel v. Hotel Employees & Restaurant Employees*, 82 Cal. Rptr. 2d 10, 14 (Ct. App. 1999). *See also Robertson v. Rodriguez*, 42 Cal. Rptr. 2d 464, 470 (Ct. App. 1995).

[13] Pet. App. 23-26.

In the spring of 1998, Mr. Cota contacted *The Docket*, the UCLA Law School student newspaper. He spoke with David Simonton, a co-editor-in-chief of the paper, who interviewed Mr. Cota over the telephone and in person, and reviewed many written materials that Mr. Cota supplied to him. After conducting some additional interviews, Mr. Simonton wrote an article entitled "The Strange Tale of J. Alex Cota" that appeared in *The Docket* in April 1998. Mr. Simonton reported Mr. Cota's claims, and then stated his opinion that Mr. Cota's evidence of wrongdoing was inconclusive.[14]

Mr. Cota retaliated a year later by filing a lawsuit, in which he claimed that Mr. Simonton had not been sufficiently sympathetic to his claims. His lawsuit also named the Regents of the University of California and Susan Westerberg Prager, who was the dean of UCLA Law School when the article appeared.[15] Defendants responded with a motion to strike under section 425.16.[16]

The Los Angeles Superior Court granted the motion after a hearing at which it determined that there was no probability that Mr. Cota could prevail on his claims.[17] The California Court of Appeal for the Second Appellate District affirmed in the decision that is the subject of Mr. Cota's petition for certiorari. Its opinion focused on five

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[14] Pet. App. 59-69.

[15] Pet. App. 21-33.

[16] Pet. App. 44-69.

[17] Pet. App. 97-116.

statements that Mr. Cota claimed were defamatory (all of which are set out verbatim in that court's decision):[18]

- Three of the statements "were decidedly statements of opinion and not of fact."[19] Under state law, such statements are not defamatory.[20]

- Although the remaining two statements were factual, they were not defamatory. One was not false.[21] The other was at most false in its details and did not subject Mr. Cota to hatred or contempt.[22]

- The court also determined that Mr. Cota was a limited purpose public figure under the principles established in *Gertz v. Robert Welch, Inc.*[23] There was no evidence that defendants acted with actual malice.[24]

The California Supreme Court denied review of the Court of Appeal's decision on March 14, 2001.[25]

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[18] *See* Pet. App. 5-8.

[19] Pet. App. 13.

[20] *See, e.g., Copp v. Paxton*, 52 Cal. Rptr. 2d 831, 838 (Ct. App. 1996).

[21] Pet. App. 16-17.

[22] Pet. App. 17-18.

[23] 418 U.S. 323 (1974).

[24] Pet. App. 18.

[25] Pet. App. 20.

REASONS FOR DENYING THE WRIT

A. This Court does not have jurisdiction to review the California Court of Appeal's ruling that Mr. Cota was a public figure, because its decision rests on the adequate and independent state ground that the statements about Mr. Cota were not defamatory under California law

Although the Court of Appeal ruled that Mr. Cota was a public figure, it also ruled that none of the five statements in Mr. Simonton's article that Mr. Cota found offensive were defamatory. It determined that three of them were statements of opinion, and not of fact. Although the other two were statements of fact, one was not false and the other did not subject Mr. Cota to hatred or contempt.

This Court does not have jurisdiction to review a federal question decided by a state court, if the state court's decision rests on an adequate and independent state ground.[26] Here, the Court of Appeal's ruling that the statements in question were not defamatory was not interwoven with its public figure ruling. It is clear on the face of the opinion that it was "alternatively based on bona fide separate, adequate, and independent [state law] grounds."[27] Therefore, this Court lacks jurisdiction to review the Court of Appeal's public figure ruling.

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[26] *Michigan v. Long*, 463 U.S. 1032, 1037-44 (1983); *Fox Film Corp. v. Muller*, 296 U.S. 207, 209-11 (1935).

[27] *Michigan v. Long*, 463 U.S. at 1041.

B. The California Court of Appeal's determination that Mr. Cota was a public figure does not raise an important federal question that merits this Court's review

Although Mr. Cota asks this Court to review the California Court of Appeal's determination that he was a public figure, that ruling does not raise an important federal question that merits this Court's review. The Court extended the actual malice standard to defamation actions against public figures in *Curtis Publ'g Co. v. Butts*.[28] Over the ensuing years, the Court has explained what a public figure is several times.[29] The applicable legal principles are well settled:

> For the most part those who attain this status [of public figure] have assumed roles of especial prominence in the affairs of society. Some occupy positions of such persuasive power and influence that they are deemed public figures for all purposes. More commonly, those classed as public figures have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved. In either event, they invite attention and comment.[30]

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[28] 388 U.S. 130 (1967).

[29] *See Hutchinson v. Proxmire*, 443 U.S. 111 (1979); *Wolston v. Reader's Digest Ass'n*, 443 U.S. 157 (1979); *Time, Inc. v. Firestone*, 424 U.S. 448 (1976); *Gertz, supra*; *Monitor Patriot Co. v. Roy*, 401 U.S. 265 (1971); *Greenbelt Co-op. Pub. Ass'n v. Bresler*, 398 U.S. 6 (1970).

[30] *Gertz*, 418 U.S. at 345.

Here, the Court of Appeal adhered to those principles. It explained the law in terms consistent with this Court's decisions:

> An individual who voluntarily injects himself or is drawn into a particular public controversy thereby becomes a public figure for a limited range of issues. [Citation omitted]
>
> A three-step analysis is involved in determining whether an individual is a public figure for a limited range of issues. The courts must first find that there was a public controversy. Next, the courts examine whether the plaintiff undertook "some *voluntary* act through which he seeks to influence the resolution of the public issues involved." . . . Finally the alleged defamation must have been germane to the plaintiff's participation on the controversy.[31]

It then ruled that Mr. Cota was a public figure because he involved himself in a public controversy at UCLA:

> The issues of McCarthyism and retaliation against UCLA law students for their expression of political beliefs are matters of public controversy. Since appellant instigated the *The Docket* article and attempted to influence public opinion through it, we conclude that he is a public figure with respect to the subject matter of the article.[32]

The decisions that Mr. Cota claims establish a conflict in the law do not support his argument. In each of the cited cases, the court decided the public figure issue

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[31] Pet. App. 14-15.

[32] Pet. App. 15.

according to the principles laid down in *Butts*, *Gertz* and this Court's other decisions.[33]

The Court of Appeal correctly determined that Mr. Cota was a public figure in accordance with this Court's rulings. Even if its determination were incorrect, the Court should still deny the petition: "A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law."[34]

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[33] *See Silvester v. American Broad. Cos.*, 839 F.2d 1491, 1494 (11th Cir. 1988) (basing decision on "the two basic *Gertz* criteria which distinguish public figures from private figures"); *Trotter v. Jack Anderson Enter.*, 818 F.2d 431, 433 (5th Cir. 1987) (public figures become such by "thrust[ing] themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved," or because they "voluntarily inject [themselves] or [are] drawn into a particular public controversy"); *Dameron v. Washington Magazine, Inc.*, 779 F.2d 736, 741 (D.C. Cir. 1985) (requiring "an inquiry into the plaintiff's voluntary actions that have caused him to become embroiled in a public controversy"), *cert. denied*, 476 U.S. 1141 (1986); *Lerman v. Flynt Distrib. Co.*, 745 F.2d 123, 136 (2nd Cir. 1984) (question is "the nature and extent of an individual's participation in the particular controversy giving rise to the defamation"), *cert. denied*, 471 U.S. 1054 (1985); *Waldbaum v. Fairchild Publications, Inc.*, 627 F.2d 1287, 1292 (D.C. Cir.) (one is a public figure "if he is attempting to have, or realistically can be expected to have, a major impact on the resolution of a specific public dispute that has foreseeable and substantial ramifications for persons beyond its immediate participants"), *cert. denied*, 449 U.S. 898 (1980).

[34] Sup. Ct. R. 10.

C. Mr. Cota did not make a proper constitutional challenge to the California anti-SLAPP statute in the state court

Although Mr. Cota asks this Court to consider the constitutionality of the anti-SLAPP statute, the Court of Appeal did not pass on that question because Mr. Cota did not press it in the trial court.[35] As a general rule, this Court "will not consider a petitioner's federal claim unless it was either addressed by, or properly presented to, the state court that rendered the decision we have been asked to review."[36]

Mr. Cota has not provided a convincing reason for the Court to depart from this settled rule. He concedes that he did not raise the issue in the trial court, but argues that it would not have been possible to do so until the court decided the motion.[37] He does not explain what prevented him from arguing in response to the motion that the statute's limits on discovery violated his constitutional rights.

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[35] *See* Pet. App. 18 ("Finally, because appellant did not argue in the trial court that section 425.16 was constitutionally violative, and he has provided no authority for supporting his contention that section 425.16 violates either the First Amendment to the United States Constitution or article IX, section 9 of the California Constitution, we consider this issue waived").

[36] *Adams v. Robertson*, 520 U.S. 83, 86 (1997). *See also Illinois v. Gates*, 462 U.S. 213, 221-24 (1983) (applying the "not pressed or passed on below" rule to decline review of an issue not ruled on by the state court).

[37] Pet. 6.

D. Mr. Cota's challenge to the California anti-SLAPP statute does not raise a substantial constitutional question

Although Mr. Cota urges this Court to hold the anti-SLAPP statute unconstitutional, he has not cited any authorities that would support application of the constitutional provisions that he cites to a state's efforts to regulate SLAPP suits:

- The *Daniels* case (cited on page 14 of the Petition) involved a due process claim for personal injuries sustained when an inmate slipped on a pillow negligently left on a stairway by a sheriff's deputy. This Court ruled that the Due Process Clause does not impose a duty of due care on jailers. It did not say anything about a litigant's right to discovery in a defamation case.[38]

- The *Mine Workers* case (also cited on page 14 of the Petition) involved a state bar association ruling that barred a union from retaining staff attorneys to represent its members in workers' compensation proceedings.[39] The Court ruled that such actual interference with access to the workers' compensation system was unlawful.

This Court has held other restrictions invalid where they posed an obstacle to getting in the courthouse

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[38] *Daniels v. Williams*, 474 U.S. 327 (1986).

[39] *United Mine Workers of America v. Illinois State Bar Ass'n*, 389 U.S. 217 (1967).

door.[40] Plaintiffs in such cases must demonstrate that state action hindered their efforts to pursue nonfrivolous legal claims, and that they suffered actual injury.[41] This Court has never suggested that the First Amendment or the Due Process Clause limits a state's authority to impose limitations on the discovery process after plaintiff has been allowed to present his claim, or to establish procedures for expeditious resolution of meritless lawsuits. Although some courts of appeals have gone so far as to rule that active concealment of evidence may impose liability, no court has held that a mere failure to provide discovery constitutes unlawful interference with access to the judicial system.[42]

Here, the anti-SLAPP statute does not prevent plaintiffs with valid defamation claims from pursuing those claims in court. Anyone with a defamation claim may get in the courthouse door by paying the filing fee, as Mr. Cota did. If a defendant wishes to challenge a claim under the anti-SLAPP statute, it files a motion within 60 days after service of the complaint. The motion calls upon the plaintiff to present sufficient evidence to establish a prima facie case. Although the filing of the motion stays discovery, the plaintiff may still obtain discovery if necessary to establish a prima facie case.

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[40] *Lewis v. Casey*, 518 U.S. 343, 350-54 (1996); *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731, 741 (1983); *Bounds v. Smith*, 430 U.S. 817, 821-23 (1977).

[41] *Lewis*, 518 U.S. at 350-54.

[42] *See Foster v. City of Lake Jackson*, 28 F.3d 425, 429-30 (5th Cir. 1994); *Thompson v. Boggs*, 33 F.3d 847 (7th Cir. 1994), *cert. denied*, 514 U.S. 1063 (1995).

The procedure is comparable to the summary judgment procedure under the Federal Rules of Civil Procedure. Under Rule 56, a defendant may move for summary judgment "at any time."[43] With a properly supported motion, the defendant puts the burden on the plaintiff to establish a prima facie case through admissible evidence.[44] If the plaintiff lacks the evidence necessary to respond to the motion, he or she may obtain a continuance of the motion to obtain discovery.[45]

In applying the statute, California courts have been sensitive to concerns about potential abuse of the procedure, and have avoided statutory constructions that would hamper litigants' rights:

> Anti-SLAPP legislation, therefore, must be fast, inexpensive and *constitutional* or it is of no benefit to SLAPP victims, the court or the public. In order to satisfy due process, the burden placed on the plaintiff must be compatible with the early stage at which the motion is brought and heard . . . and the limited opportunity to conduct discovery. In order to preserve the plaintiff's right to a jury trial the court's determination of the motion cannot involve a weighing of the evidence.[46]

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[43] Fed. R. Civ. P. 56(b).

[44] *See Celotex Corp. v. Catrett*, 477 U.S. 317 (1986).

[45] Fed. R. Civ. P. 56(f).

[46] *Wilcox*, 33 Cal. Rptr. 2d at 454. *See also Briggs v. Eden Council for Hope & Opportunity*, 969 P.2d 564, 574 (Cal. 1999) (section 425.16 includes "substantive and procedural limitations that protect plaintiffs against overbroad application of the anti-SLAPP mechanism"); *Rosenthal v. Great Western Fin. Sec. Corp.*,

Based on this Court's rulings and the protections incorporated into the anti-SLAPP procedure for litigants with nonfrivolous claims, there is no substantial basis for questioning the constitutionality of section 425.16.

CONCLUSION

This Court should deny Mr. Cota's petition for a writ of certiorari for the reasons explained above:

1. There is no jurisdiction to review the Court of Appeal's public figure ruling, because its decision rested on the adequate and independent ground that the statements in question were not defamatory under California law.

2. The Court of Appeal's public figure determination does not involve an important federal question that merits this Court's review.

3. The question of the anti-SLAPP statute's constitutionality was not pressed or passed on in the California state courts.

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926 P.2d 1061, 1071 (Cal. 1999) (construing section 425.16 and similar statutes to require the court to determine only if the plaintiff "has stated and substantiated a legally sufficient claim"); *Lafayette Morehouse*, 44 Cal. Rptr. 2d at 52-54 (Ct. App. 1995) (considering constitutional challenge based on due process and equal protection).

4. Mr. Cota's constitutional challenge to the anti-SLAPP statute does not raise a substantial federal question. He has not provided any convincing authority for questioning the statute's constitutionality.

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No. 00-1858

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In The

Supreme Court of the United States

J. ALEX COTA,

Petitioner,

v.

DAVID SIMONTON, *THE DOCKET*, an unincorporated association, SUSAN WESTERBERG PRAGER and BOARD OF REGENTS OF THE UNIVERSITY OF CALIFORNIA,

Respondents.

On Petition For A Writ Of Certiorari To The California Court Of Appeal, Second Appellate District, Division Two

REPLY TO BRIEF IN OPPOSITION TO PETITION

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I. REASON FOR GRANTING THE WRIT

Due to the Respondent's erroneous contentions that Petitioner failed to raise a federal question worthy of review and allegedly waived any constitutional challenge to the California Anti-SLAPP statute, Petitioner hereby submits the following additional points and authorities:

A. Petitioner raises considerable federal questions and all are important and are worthy of this Court's review.

The Respondents claim that the petitioner raises no federal questions worthy of this Court's review. In truth and in fact, the Petition raises multiple federal questions and all are worthy of review. First, California Code of Civil Procedure § 425.16 on its face requires the state courts to consider Constitutional First Amendment principles and, as such, Respondent cannot maintain an argument that the statute alone creates an adequate and independent state ground for the dismissal.[1] Secondly, the fact that the lower court refused Petitioner's request for discovery despite his counsel's argument that such a denial would result in unfair and immediate dismissal under the California statute, implicates Due Process rights of the Petitioner and the subsequent constitutionality of the statute's application to the Petitioner.

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[1] California Code of Civil Procedure, § 425.16(b)(1). "A cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States or California Constitution in connection with a public issue shall be subject to a special motion to strike. . . . "

Thirdly, the California Court of Appeals clearly determined the Petitioner to be a limited purpose public figure based upon *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974) and *New York Times v. Sullivan*, 376 U.S. 254 (1964).[2] Therefore, the California courts' own application of the statute supports the argument that the statute invokes a federal question surrounding First Amendment principles. Finally, there is a federal question by virtue of the principles enunciated in *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990) discussed in the Petition.

B. Despite the Respondents' claim otherwise, Petitioner did not waive any constitutional challenge of the California Anti-SLAPP statute.

Although Respondents state in their Opposition to Petition for Writ of Certiorari that Petitioner "does not explain what prevented him from arguing in response to the motion that the state's limits on discovery violated his constitutional rights,"[3] the contention of the Petitioner is not that the statute is unconstitutional on its face. Rather, Petitioner's contention is based upon the fact that the request for discovery, properly raised in the California Superior Court, was denied. This denial of the discovery request (and to a lesser extent, imposition of attorneys fees) is the basis for Petitioner's claim that his due process rights were violated. Had the lower court held in keeping with the instruction given by the California

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[2] Pet. App. 14-15.

[3] Brief in Opposition 10.

Court of Appeals,[4] discovery would have been granted and no constitutional challenge would have been necessary or appropriate.

Furthermore, this Court has found previously that an objection invoking "fundamental principle[s] of judicial fair play" should have "sufficed to alert the trial judge to petitioner's reliance on due process principles."[5] Notice of the Due Process argument presented by Petitioner's counsel was given when he requested discovery and stated that its denial would be "[l]ike a Blitzkrieg that destroys us. I don't mean that in a personal matter, but the legal effect is to wipe us out entirely."[6] Petitioner made such a showing by stating "[t]his will provide the Court with information on malice, the relationship of the defendants, and other significant matters, including the circumstances under which the challenged article was prepared."[7] Finally, Petitioner's counsel spoke specifically to the constitutional right of the Petitioner to redress his grievances and First Amendment considerations versus the right of an individual to assert defamation claims.[8]

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[4] *Lafayette Morehouse, Inc. v. Chronicle Publishing Co.* 37 Cal.App.4th 855, 867-868 (1995). The court stated that the opportunity for discovery "is of prime import in a libel suit against a media defendant who will generally be the principle, if not the only, source of evidence" needed to determine libel.

[5] *Taylor v. Kentucky*, 436 U.S. 478, 482 n.10 (1978).

[6] Pet. App. 112.

[7] Pet. App. 84.

[8] Pet. App. 104; Petitioner also argued at both a hearing on his Motion for Reconsideration and a hearing on defendants' Motion for Attorney Fees in the trial court that the application of the statute deprived him of his constitutional rights.

Since the lower court denied discovery,[9] the Petitioner properly raised the unconstitutionality of this action in his appeal. Although the actual language of the appeal did not specifically refer to the Due Process Clause of the Fourteenth Amendment of the United States Constitution, it did contain and provide the court of appeals with proper notice of the Petitioner's reliance on constitutional principles.

In addition, the language of California Code of Civil Procedure section 425.16 on its face specifically refers to an "act in furtherance of person's right of petition or free speech under United States or California Constitution in connection with a public figure."[10] The statute in question clearly invokes a Constitutional question which this court has appropriate jurisdiction to review.

It is ironic that opposing counsel begins their Brief in Opposition to Petition for Writ of Certiorari by explaining the purpose of California's Anti-SLAPP statute, including its attempt to protect constitutional rights,[11] but then attempts to claim that no important federal question exists which merits this Court's review. Opposing counsel conveniently sidesteps the true effect of the statute on Petitioner's right to due process and right to redress grievances, and instead switches its focus simply to the argument that the article was not libelous.

Lastly, Respondents claim that this court lacks jurisdiction because the California Court of Appeals decision

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[9] Pet. App. 112-114.

[10] Pet. App. 2.

[11] Brief in Opposition 1.

rests on the adequate and independent state ground that the statements about Mr. Cota were not defamatory. This is simply incorrect. The record clearly reflects that both the Superior Court[12] and the California Court of Appeals[13] were aware of and considered the issue of the Petitioner's status as a limited purpose public figure. In fact, the California Court of Appeals, in its determination, defined a limited purpose public figure and the effect of such a determination on the standard of proof that must be then proven in a libel case. For the Respondents to suggest that the California Court of Appeals included in their decision a finding that Petitioner was a limited purpose public figure but did not base its determination on this seems incredible especially in light of Respondents' numerous attempts to have the Petitioner deemed as such in their memoranda to the courts.

Respondents chose to cite *Long v. Michigan* in support of their contention that the state court's decision rests on an adequate and independent state ground. However, the *Long* case actually stands for the rule that jurisdiction exists "when it is not clear from the opinion itself that the state court relied upon an adequate and independent state ground and when it fairly appears that the state court rested its decision primarily on federal law."[14] The court further explained the presumption in favor of Petitioner herein by stating:

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[12] See Plaintiff's Opposition to Motion to Strike Pet. App. 82.

[13] Pet. App. 15.

[14] *Long v. Michigan*, 463 U.S. 1032, 1042 (1983).

> "Accordingly, when, as in this case, a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so. If a state court chooses merely to rely on federal precedents as it would on the precedents of all other jurisdictions, then it need only make clear by a plain statement in its judgment or opinion that the federal cases are being used only for the purpose of guidance, and do not themselves compel the result that the court has reached. In this way, both justice and judicial administration will be greatly improved."[15]

Furthermore, this Court had previously stated in *Zacchini v. Scripps-Howard Broadcasting Co.* that the Court took jurisdiction because "at the very least, the [state] court felt compelled by what it understood to be federal constitutional considerations to construe and apply its own law in the manner it did."[16] California Code of Civil Procedure, § 425.16 requires by its language that the state courts take into consideration its purpose of protecting "the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances."[17] Therefore, like *Zacchini*, the state court was compelled to

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[15] *Id.* at 1040-41.

[16] *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 568 (1977). *See also, Delaware v. Prouse*, 440 U.S. 648 (1979).

[17] California Code of Civil Procedure, § 425.16.

base any decision on federal constitutional considerations.

Petitioner continues to assert that the decision was based on the California courts understanding of the Anti-SLAPP statute which on its face requires the court to invoke First Amendment principles as previously defined by this Court. Therefore, as in *Long*, jurisdiction is proper since it is the most reasonable explanation for the decision to assume that the court relied on its understanding of First Amendment precedence as it is required to do by the language of California's Anti-SLAPP statute.

The California Court of Appeals in its decision refused to decide the constitutional challenge to the Anti-SLAPP statute as improperly raised in the superior court. However, "[t]he issue whether a federal question was sufficiently and properly raised in the state courts is itself ultimately a federal question, as to which this Court is not bound" by the state court decision.[18] Therefore, if this Court determines that a federal question was raised in the state courts (which it clearly was), jurisdiction is proper.

CONCLUSION

This Court should grant the Petitioner's petition for writ of certiorari for the reasons explained above.

1. This Court has jurisdiction to review the Court of Appeal's ruling because the decision did not rest on

[18] *Street v. New York*, 394 U.S. 576, 583 (1969).

adequate and independent state grounds since the anti-SLAPP statute clearly requires constitutional analysis in its application.

2. The constitutionality of the anti-SLAPP statute was pressed upon in the Superior Court and the Court of Appeals was incorrect in its decision to the contrary.

3. The Court of Appeals based its decision in whole or in part on an initial determination that the Petitioner was a limited purpose public figure and therefore invokes a federal question of great importance in light of the varying tests in application today through various federal and state courts as explained in the initial petition.

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